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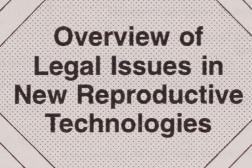
Commission royale sur les nouvelles techniques de reproduction

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### **OVERVIEW OF LEGAL ISSUES IN** NEW REPRODUCTIVE **TECHNOLOGIES**

Research Studies of the Royal Commission on **New Reproductive Technologies** 





Volume 3 of the Research Studies

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Consistent with the Commission's commitment to full equality between men and women, care has been taken throughout this volume to use gender-neutral language wherever possible.



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#### Preface from the Chairperson



As Canadians living in the last decade of the twentieth century, we face unprecedented choices about procreation. Our responses to those choices — as individuals and as a society — say much about what we value and what our priorities are. Some technologies, such as those for assisted reproduction, are unlikely to become a common means of having a family — although the number of children born as a result of these techniques is greater than the number of infants placed for adoption in Canada. Others, such as ultrasound during pregnancy, are already generally accepted, and half of all pregnant women aged 35 and over undergo prenatal diagnostic procedures. Still other technologies, such as fetal tissue research, have little to do with reproduction as such, but may be of benefit to people suffering from diseases such as Parkinson's; they raise important ethical issues in the use and handling of reproductive tissues.

It is clear that opportunities for technological intervention raise issues that affect all of society; in addition, access to the technologies depends on the existence of public structures and policies to provide them. The values and priorities of society, as expressed through its institutions, laws, and funding arrangements, will affect individual options and choices.

As Canadians became more aware of these technologies throughout the 1980s, there was a growing awareness that there was an unacceptably large gap between the rapid pace of technological change and the policy development needed to guide decisions about whether and how to use such powerful technologies. There was also a realization of how little reliable information was available to make the needed policy decisions. In addition, many of the attitudes and assumptions underlying the way in which technologies were being developed and made available did not reflect the profound changes that have been transforming Canada in recent decades. Individual cases were being dealt with in isolation, and often in the absence of informed social consensus. At the same time, Canadians were looking

more critically at the role of science and technology in their lives in general, becoming more aware of their limited capacity to solve society's problems.

These concerns came together in the creation of the Royal Commission on New Reproductive Technologies. The Commission was established by the federal government in October 1989, with a wide-ranging and complex mandate. It is important to understand that the Commission was asked to consider the technologies' impact not only on society, but also on specific groups in society, particularly women and children. It was asked to consider not only the technologies' scientific and medical aspects, but also their ethical, legal, social, economic, and health implications. Its mandate was extensive, as it was directed to examine not only current developments in the area of new reproductive technologies, but also potential ones; not only techniques related to assisted conception, but also those of prenatal diagnosis; not only the condition of infertility, but also its causes and prevention; not only applications of technology, but also research, particularly embryo and fetal tissue research.

The appointment of a Royal Commission provided an opportunity to collect much-needed information, to foster public awareness and public debate, and to provide a principled framework for Canadian public policy

on the use or restriction of these technologies.

The Commission set three broad goals for its work: to provide direction for public policy by making sound, practical, and principled recommendations; to leave a legacy of increased knowledge to benefit Canadian and international experience with new reproductive technologies; and to enhance public awareness and understanding of the issues surrounding new reproductive technologies to facilitate public participation in determining the future of the technologies and their place in Canadian society.

To fulfil these goals, the Commission held extensive public consultations, including private sessions for people with personal experiences of the technologies that they did not want to discuss in a public forum, and it developed an interdisciplinary research program to ensure that its recommendations would be informed by rigorous and wide-ranging research. In fact, the Commission published some of that research in advance of the Final Report to assist those working in the field of reproductive health and new reproductive technologies and to help inform the public.

The results of the research program are presented in these volumes. In all, the Commission developed and gathered an enormous body of information and analysis on which to base its recommendations, much of it available in Canada for the first time. This solid base of research findings helped to clarify the issues and produce practical and useful recommendations based on reliable data about the reality of the situation, not on speculation.

The Commission sought the involvement of the most qualified researchers to help develop its research projects. In total, more than 300

scholars and academics representing more than 70 disciplines — including the social sciences, humanities, medicine, genetics, life sciences, law, ethics, philosophy, and theology — at some 21 Canadian universities and 13 hospitals, clinics, and other institutions were involved in the research program.

The Commission was committed to a research process with high standards and a protocol that included internal and external peer review for content and methodology, first at the design stage and later at the report stage. Authors were asked to respond to these reviews, and the process resulted in the achievement of a high standard of work. The protocol was completed before the publication of the studies in this series of research volumes. Researchers using human subjects were required to comply with appropriate ethical review standards.

These volumes of research studies reflect the Commission's wide mandate. We believe the findings and analysis contained in these volumes will be useful for many people, both in this country and elsewhere.

Along with the other Commissioners, I would like to take this opportunity to extend my appreciation and thanks to the researchers and external reviewers who have given tremendous amounts of time and thought to the Commission. I would also like to acknowledge the entire Commission staff for their hard work, dedication, and commitment over the life of the Commission. Finally, I would like to thank the more than 40 000 Canadians who were involved in the many facets of the Commission's work. Their contribution has been invaluable.

Patricia a. baird

Patricia Baird, M.D., C.M., FRCPC, F.C.C.M.G.



#### Introduction



The scope, diversity, and complexity of the legal issues raised by new reproductive technologies required that the Royal Commission on New Reproductive Technologies undertake studies in a wide range of areas to examine the legal implications of the technologies. This volume provides an overview of various legal approaches to the entire body of technologies in the Commission's mandate. Volume 4 examines specific legal issues related to parenthood. The conclusion that arises from a careful reading of these two volumes is that, as a society, we have only begun to deal with the many legal questions that must now be considered and the many legal implications that will arise as reproductive technology and knowledge develop.

In some cases, the papers in this volume attempt to outline how existing law — in particular, the "framework" legislation such as the Canadian Charter of Rights and Freedoms, the Quebec Civil Code, and international law — applies to the availability and use of new reproductive technologies. As they indicate, much work is still required to understand the precise nature of the rights and obligations generated by new reproductive technologies. This is complicated by the fact that it is not a static process; at the same time as the legislation is being analyzed for its applications to new reproductive technologies, the legislation itself is subject to a process of development and clarification that will have an impact on how the technologies are interpreted in light of the law.

As Sheilah Martin points out, the directive in the Commission's mandate to examine the technologies' legal implications does not mean that the law must be accepted as it stands. In some cases, existing law may be based upon assumptions that are not valid while in other cases, there may be no existing law that applies to the specific situation. Royal commissions, she says, are actively engaged in the creation of new legal principles. Several of the papers in this volume focus on how this task

might be approached, as well as outlining legal principles in areas where existing law is not adequate to meet the challenges posed by new reproductive technologies. The technologies in the Commission's mandate pose challenges to laws about privacy and confidentiality, to appropriate legal models for controlling reproductive materials, and for controlling commercial aspects of the applications of various technologies. The papers in this volume provide useful insights into how we might meet these challenges in Canada.

#### The Studies

Martha Jackman begins the volume with an analysis of the laws that provide the framework for a consideration of any legal questions in Canada — the Constitution Acts, including the Charter. On the surface, it might be thought that the Constitution's division of legislative responsibilities means that federal regulation of new reproductive technologies could infringe upon provincial jurisdiction. She shows, however, that there are very clear and important federal, as well as provincial, dimensions to new reproductive technologies. Issues integral to the technologies extend far beyond the health care system and have become matters of national interest. This means that the federal government has the responsibility and constitutional authority to protect the interests of Canadian citizens and society by putting in place needed public policies.

While the Constitution Act, 1867 sets out the respective rights and obligations of Parliament and the provincial legislatures, the Charter sets out the rights and obligations of individuals. Professor Jackman examines whether a right to parenthood is implicit in section 7 or 15 of the Charter, and, if so, whether such a guarantee extends to the right to use, or to claim state-subsidized access to, new reproductive technologies to achieve parenthood. She also examines the permissibility of non-medical barriers to access to new reproductive technologies, such as marital status, sexual orientation, and social or economic condition. She then goes on to examine the potential rights of those providing services, the embryo, the fetus, and children born through the use of new reproductive technologies. In her discussion of access to the policy-making process, Professor Jackman recognizes the centrality of ensuring that women and other underrepresented groups have a voice.

Sheilah Martin's overview of the legal system in Canada demonstrates that, within this framework of the Constitution and the Charter, many avenues are open with regard to new reproductive technologies. Professor Martin points out that law both shapes and is shaped by its social context, and that existing law should not be accepted uncritically as achieving a just, acceptable, and appropriate balancing of interests. She also warns against automatically seeking a solution in the law. New reproductive technologies are at once intensely private and publicly important. They demand both flexibility to respond to individual cases and consistency and

uniformity to apply broad social values equitably. As Professor Martin demonstrates, the law is not always the most effective instrument for achieving a chosen goal in social policy. She describes how the legal aspects of new reproductive technologies are sufficiently challenging that the legal system will have to respond in a dynamic and creative manner. Possible ways in which such a response could be shaped are set out in some of the remaining papers in this volume.

For instance, as Eugene Oscapella points out in his overview of Canadian laws relating to privacy and confidentiality in the medical context, there may be gaps in the current laws that protect individuals' privacy. The use of new reproductive technologies poses particular threats to individual privacy because the technologies, by their nature, both require and generate personal information. Genetic technologies, for example, could reveal a broad range of previously unknown and highly personal information to practitioners, researchers, and governments, as well as to the individuals themselves. Mr. Oscapella outlines how this information will require sensitive and careful protection and handling by medical, legal. and other relevant authorities. Effective safeguards in handling confidential information are needed in view of the potential (described in Volume 11) for long-term follow-up of the use of the technologies through linking records on exposures and outcomes. The legal challenge is to ensure that individuals' interest in the confidentiality of their medical records is balanced against their interest in ensuring that any medical procedure is both effective and safe. As Mr. Oscapella demonstrates, the need for privacy and the need to conduct research both generate legal issues that must be addressed by the legal system, in a way that to date has not been done.

Other legal issues arise from the relatively new ability to store human sperm, zygotes, and embryos outside the human body for extended periods of time. Morris Litman and Gerald Robertson analyze these issues and consider the implications of applying the property law model to reproductive materials. Their conclusion is that property law contains sufficient flexibility to accommodate the policy concerns that exist in this area, but that it may be more appropriate to treat an embryo as unique in itself — "sui generis" — than as a traditional form of property. This conclusion underscores Sheilah Martin's point that choosing a legal regime to respond to the issues raised by new reproductive technologies must be done with care.

Katherine Cherniawsky and Peter Lown move from physical property to intellectual property in their consideration of potential ways of guaranteeing commercial protection of the products and processes developed as a result of research into or diagnosis or treatment of various conditions. Conclusions about the parameters and form of intellectual property protection in the field of new reproductive technologies take on added complexity because of the tension between the use of human

reproductive material in these products or processes and the important

ethical principle of the non-commercialization of reproduction.

The debate about how the principle of non-commercialization should apply is at the heart of the study by Melody Martin and colleagues on the limits of freedom of contract in relation to new reproductive technologies. The four authors have examined what role, if any, commercial exchange arrangements should play in new reproductive technologies, particularly given the complex moral and legal issues involved. Based on the unique moral nature of reproductive materials and services, the authors conclude that there is a limited role for commercialization — "constrained commodification" — as a means of offsetting other barriers. They give the examples of facilitating the supplying of reproductive materials for altruistic reasons where financial circumstances would otherwise make this impossible and of ensuring that access to reproductive materials or services is not solely a function of willingness or ability to pay. Their conclusions again underscore the importance of careful choice of legal response; in this case, they take the position that an unqualified prohibition of all commercial activity would have an inhibiting effect on otherwise legitimate activities in the area of new reproductive technologies and that a middle ground must be found.

Jean Goulet examines primarily from the perspective of the Quebec Civil Code the issue of how legislatures have used the law to preserve social and cultural values and principles relating to the human body. Quebec civil law makes a distinction between things and non-things, and the human body, as a non-thing, cannot be seen to be subject to a right of ownership. Since it is sacred, the human body cannot be the subject of a commercial transaction. The designation of the human body as a non-thing, Professor Goulet concludes, means that the human body, or its parts, should not be intentionally sold because societal values must first be taken into consideration and would preclude it — again coming back to Sheilah Martin's firm placement of the legal system in a social context.

Monique Ouellette continues Professor Goulet's review of Quebec's Civil Code, paying particular attention to amendments to the Code that contain provisions relating to filiation in the context of assisted insemination, and that render procreation and gestation agreements (or preconception arrangements) null. She contends that these amendments represent an equitable social balance, and, as such, provide a model that may be useful for other provinces seeking to bring their family law up-to-date with current developments in new reproductive technologies. Professor Ouellette examines other provisions of the Civil Code, particularly the legal principles of contract law, as they relate to new reproductive technologies. As Professor Goulet points out, there is a tendency for the common law system of the majority of Canada's provinces to prevail, leaving the civil law in "the suffocating darkness that envelops the antechamber of oblivion." The studies by Professor Goulet and Professor Ouellette clarify how Quebec civil law deals with many of the difficult issues

surrounding new reproductive technologies. In doing so, they provide potential insights and guidance for other provinces where the common-law system prevails.

Finally, Rebecca Cook moves beyond Canada's borders to examine how the major international covenants and conventions to which Canada is a signatory may have an impact on the legal issues generated by new reproductive technologies. Professor Cook identifies many substantive rights set out in the International Covenant on Civil and Political Rights. the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, including the right to life, the right to liberty and security of the person, the right to marry and found a family, the right to reproductive health and health care, and the right to the benefits of scientific progress. As Professor Cook points out, the interpretation of these differs in different countries. She also demonstrates how these rights are constrained in view of competing social concerns and realities. Canadian legislatures that ignore these rights may, however, be subject to the considerable political sanction flowing from decisions of international tribunals and from the obligation to report to international committees on compliance with the principles contained in these agreements. This international law dimension is of relevance to all those who believe that Canada has an important role to play as a leader in setting international standards for the development and use of new reproductive technologies.

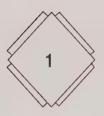
#### Conclusion

At this early stage in the legislative history of new reproductive technologies, legal response to the technologies cannot be definitive. It is important to work toward increasing public and political awareness of the potential problems associated with the research, development, and application of new reproductive technologies and ensuring that the law responds in an appropriate manner. The Commission's task in the legal arena has been to provide the groundwork and to establish the principles that will allow a better understanding and wiser handling of new reproductive technologies as a matter for regulatory attention.

The legal overviews and analyses in this volume have made an important contribution to this task, outlining the existing law as it applies to new reproductive technologies and setting out potential responses to the questions of "new law" that are raised by the technologies. It is not surprising that there are many questions as yet unanswered. The papers do demonstrate, however, that there is a very significant role for Canadian legislatures to play in establishing the legal framework necessary to promote the social values and goals that are desirable in regulating new reproductive technologies.

The Commission has found the studies in this volume very helpful in its efforts to make recommendations for laws needed to regulate new

reproductive technologies in an effective and equitable way. Commissioners believe, however, that the rights and obligations of all those involved in the research, development, and application of the technologies will have to be elaborated carefully and precisely. In particular, the Commission has looked, for example, to licensing as a flexible response that will allow adjustment to changing issues and evolving technologies. As the papers in this volume show, the most important and challenging legal developments concerning new reproductive technologies are still very much before us.



# The Constitution and the Regulation of New Reproductive Technologies

#### Martha Jackman



#### **Executive Summary**

Governments face the challenge of responding to the new and complex issues raised by new reproductive technologies (NRTs) in a manner that reflects the public interest. Adding to this challenge are the constraints imposed by the Canadian Constitution.

Part 1 of the paper considers the impact of the constitutional division of powers on the regulation of NRTs. The paper suggests that NRTs are susceptible to extensive regulation by the federal government, as a matter of national interest and concern, under the peace, order, and good government power, as well as under federal spending, criminal law, trade and commerce, taxing, and treaty powers. Part 1 also examines the scope of provincial jurisdiction over NRTs, and the relationship between federal and provincial law in this area.

Part 2 of the paper discusses the obligations and limits that the Canadian Charter of Rights and Freedoms imposes on federal and provincial governments in regulating NRTs. It considers whether parenthood is a right guaranteed under section 7 or section 15 of the Charter and, if so, whether such guarantees extend to parenthood through the use of NRTs.

This paper was completed for the Royal Commission on New Reproductive Technologies in January 1992.

The paper questions the permissibility of barriers to access to NRTs based on marital status, sexual orientation, social and economic condition, and other prohibited grounds of discrimination. It examines the potential rights of providers of services, the fetus, the embryo, and children born through the use of NRTs, and the limits on NRT-related rights that might be justified under section 1 of the Charter. It also discusses the issue of access to the policy-making process, including the particular rights of women.

Part 3 of the paper considers, in light of the ongoing process of constitutional change in Canada, the possible impact of future constitutional arrangements on the regulation of NRTs, including proposed changes to the federal-provincial division of powers and to the

Charter.

#### Introduction

As technological interventions in the area of human reproduction move from the realm of theory to practice, difficult social, ethical, and policy issues must be addressed. For example, what is the source of demand for these new reproductive technologies (NRTs), and who is involved in their research and development? To whose interests do providers of NRTs respond, and to whom are they responsible? What barriers are faced by those seeking access to NRTs, and should such barriers be removed? Are the benefits that NRTs provide, in the form of children who might not otherwise be born, counterbalanced by adverse effects on other societal interests? What impact do NRTs have on women, children, the economically disadvantaged, and people with disabilities?

Governments face the challenge of responding to these issues such that regulation of NRTs reflects the public interest. Adding to this challenge are the constraints imposed by the Canadian Constitution. The Constitution Act, 18671 divides legislative authority between the Parliament of Canada and the provincial legislatures, and the Canadian Charter of Rights and Freedoms<sup>2</sup> imposes obligations and places limits on all governments in their interactions with individual citizens.

This study examines both the federal-provincial division of powers and the Charter to clarify the implications of relevant constitutional provisions

for legislative and regulatory intervention in the field of NRTs.

Part 1 focusses on the division of powers under the Constitution Act, 1867. It reviews the principal categories of federal and provincial jurisdiction relevant to NRTs, as well as the relationship between the two. It also considers the subject matter and scope of constitutionally permissible federal and provincial regulation of NRTs and the impact of federal law on provincial legislation in this area.

Part 2 focusses on the impact of the Canadian Charter of Rights and Freedoms. It discusses Supreme Court case law relating to section 7, section 15, and other relevant sections of the Charter, and it considers the

obligations imposed and the limits placed by these provisions on government intervention in the field of NRTs. In particular, it addresses the question of reproductive and parental rights; barriers to services; the rights of providers of NRTs; potential rights of the fetus, embryo, and gamete; the rights of children born through the use of NRTs; the issue of access to the policy-making process; and women's rights in the NRT context.

Part 3 assesses the possible impact of future constitutional arrangements on the regulation of NRTs, including proposed changes to the

existing division of powers and amendments to the Charter.

# 1. The Federal-Provincial Division of Powers and New Reproductive Technologies

### New Reproductive Technologies as a "Matter" for Legislative Intervention

Sections 91 and 92 of the Constitution Act, 1867 distribute legislative responsibility between Parliament and the provincial legislatures, granting each level of government exclusive authority to legislate in relation to the "classes of subjects" assigned to it. Although not explicitly provided for in the written Constitution, disputes over the constitutional validity of legislation on division-of-powers grounds historically have been settled by the courts.<sup>3</sup> To decide whether legislation is within the competence of the government that adopted it, a court first will ascertain the subject matter of that legislation. Then, it will examine sections 91 and 92 to determine whether the matter in question falls within a class of subjects assigned to either level of government.

In characterizing a law, a court considers both its purpose and effects; however, once a law is characterized as relating "in pith and substance" to a matter within the competence of the government that adopted it, its incidental effects on matters within the jurisdiction of the other level of government will not affect its constitutionality. For example, the incidental effects of federal divorce legislation on child custody have been found acceptable, although child custody generally falls within provincial jurisdiction. The courts also have recognized certain laws as presenting a "double aspect"; that is, containing matters falling within federal jurisdiction for one purpose and within provincial jurisdiction for another. For example, spousal and child maintenance provisions have been found valid under the federal divorce power as well as under the provincial power related to property and civil rights.

· In some situations, the constitutional validity of a statute is evident. For example, the federal Divorce Act<sup>6</sup> clearly relates to divorce, which falls within the constitutional jurisdiction of the federal government of Canada over marriage and divorce, under section 91(26). The issue of

constitutionality often is more problematic, however, either because the subject matter of the disputed legislation does not fall clearly into any class of subjects expressly enumerated in sections 91 or 92 or because the legislation appears to relate to matters falling within the jurisdiction of both

levels of government.

Determining which level of government is constitutionally competent to enact NRT-related legislation presents both above-described difficulties. Like many pressing legislative concerns, NRTs do not figure as an express class of subjects under sections 91 or 92. The same is true for many matters embraced by the term NRTs, including human reproduction, medicine, health, technology, and research. Generally, regulation of NRTs appears to have an impact upon matters falling within several classes of subjects, some of which are assigned to Parliament and others of which are assigned to the legislatures. The paper identifies those heads of federal and provincial jurisdiction that are the most obvious sources of constitutional authority for the regulation of NRTs and examines the subject matter and scope of permissible regulation under each.

#### The Peace, Order, and Good Government Power

#### The Scope of the Peace, Order, and Good Government Power

The federal peace, order, and good government (POGG) power is a residual power found in the opening paragraph of section 91:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The courts have identified two types of situations in which the POGG power will support federal legislative action:<sup>8</sup> first, in emergency situations, Parliament may adopt temporary legislation dealing with matters of national urgency.<sup>9</sup> Second, under the "national-concern" branch of the POGG power, Parliament can regulate matters going beyond local or provincial interest, which are inherently the "concern of the Dominion as a whole."<sup>10</sup>

The most recent, comprehensive review of the national-concern branch of the POGG power is found in *R. v. Crown Zellerbach Canada Ltd.*, <sup>11</sup> which upheld federal regulation of marine pollution under the Ocean Dumping Control Act. <sup>12</sup> In his majority opinion, Justice Le Dain argued that for a historically or conceptually new matter to qualify under the national-concern doctrine, "it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution." <sup>13</sup> In other words, such a subject must be of concern to Canada as a whole and

have ascertainable, reasonable limits insofar as its impact on provincial jurisdiction is concerned. The provinces' ability to deal with the matter effectively through cooperative action, and the effect on extraprovincial interests of a province's failure to regulate the matter's intraprovincial aspects, are, Justice Le Dain suggested, particularly relevant to determining whether the matter has attained the requisite degree of singleness or indivisibility, since the inter-relatedness of the intra- and extraprovincial dimensions of the problem creates the need for single or uniform legislative treatment.<sup>14</sup>

### Federal Regulation of New Reproductive Technologies Under the Peace, Order, and Good Government Power

Infertility, assisted human reproduction, prenatal diagnosis and genetics, and embryo and fetal tissue research are matters of significant national concern. The social, political, and legal backdrop against which the Royal Commission on New Reproductive Technologies was appointed — and the decision to establish the Commission itself — reflect the subject's national dimensions and the seriousness with which it is viewed by legislators and the public. In practical and conceptual terms, NRTs also are a new matter. Techniques of assisted human reproduction are not necessarily of recent origin; however, they have been developed and applied on significant scale only within the past few decades. The widespread debate generated by NRTs is based in part on their rapid scientific and technological development and on the perception that these technologies, although new, already have outstripped the ability of Canadian society to respond.

National concern over the development and use of NRTs and their recent origins are significant factors for purposes of constitutional classification. Like most subjects assigned by the courts to the federal POGG power, NRTs did not exist as a conceptually distinct matter at the time of Confederation. Clearly, they are of national rather than "merely local or private" concern. In particular, they extend beyond the scope of local or provincial health as it is understood under section 92(13) and are more properly characterized as matters of "national welfare." As Justice Le Dain explained in *R. v. Crown Zellerbach*, however, for a subject to be classified under the federal POGG power, not only must it be historically or conceptually new and of national importance; it must also have a "singleness, distinctiveness and indivisibility" that distinguishes it from matters of provincial concern and an impact on provincial jurisdiction that is reconcilable with the constitutional division of powers. 17

At one level, the field of NRTs, as defined in the Commission's mandate, embraces a wide variety of matters. Infertility, a major impetus for research and development of NRTs, 18 has multiple causes, including occupational and environmental hazards, sexually transmitted diseases (STDs), age, and stress. Prevention of infertility can occur at a primary level, at the level of medical practice, and through public education.

Methods of assisted human reproduction include *in vitro* fertilization (IVF), embryo transfer, artificial insemination (AI), surrogate motherhood, and adoption. Prenatal diagnosis and genetics and embryo and fetal tissue research also are included within the rubric of NRTs. Thus, it may be argued that NRTs as a general matter can be subdivided into component parts, including public education, occupational and environmental safety, reproductive health, and medical technology and attributed to the legislatures for regulation on a province-by-province basis.

Nevertheless, federal regulation of NRTs under the national-concern branch of the POGG power can be justified. NRTs possess a conceptual and practical integrity and distinctiveness. Their fundamental object is human reproduction, which is itself unique in historical, social, and ethical terms. Viewed as a biological function, reproduction is easily distinguishable from other human health matters. It has particular social significance and particular ethical, political, and economic dimensions, and it creates particular legal relations and responsibilities. Focusing on reproduction, NRTs can be distinguished from other areas of medical science, technology, research, and health service.

State control over the development and use of NRTs is required to safeguard interests relating to the health and well-being of individuals, the welfare of women, and the welfare of society. At the level of both policy and practice, effective regulation of one dimension of NRTs depends greatly on effective regulation of others.

For example, a legislative policy favouring disclosure of information relating to the medical and social histories of children born through the use of NRTs will be compromised by a failure to ensure proper compilation and maintenance of the biological parents' health and social records. Similarly, failure to regulate some or all aspects of NRTs in one province or region will adversely affect the interests that such regulation seeks to promote elsewhere. For example, because of the social significance of the commodification of women's reproductive services, an absence of legal protection for surrogate mothers in one province while the practice is restricted or prohibited elsewhere will have a harmful impact on surrogate mothers and women in the province in question and on Canadian women generally.

In short, the significance and potential consequences of the research, development, and use of NRTs for all Canadians favour national uniformity over provincial or regional diversity in legislative treatment. To effectively safeguard individual and societal interests involved, it may be argued that regulation of NRTs must occur at the federal level rather than the local or provincial level.

Concerning other criteria forwarded by the Supreme Court in the *Crown Zellerbach* case, <sup>19</sup> NRTs as a legislative matter are not "totally lacking in specificity" or "so pervasive that it knows no bounds." <sup>20</sup> Unlike "containment and reduction of inflation," which Justice Beetz characterized as a subject too diffuse for federal jurisdiction under the POGG power in

the Anti-Inflation Act Reference,<sup>21</sup> NRTs possess practical, conceptual integrity and cohesiveness. Federal intervention in this area would be delimited in object and scope. Attributing jurisdiction over NRTs to the federal government under the POGG clause would not "radically alter the division of legislative powers in Canada,"<sup>22</sup> or "render most provincial powers nugatory."<sup>23</sup> As in other areas, valid general provincial legislation, for example, relating to hospitals or local health, could have an incidental impact on NRTs as a federal matter. As discussed in detail below,<sup>24</sup> such provincial laws remain operative so long as they are functionally compatible with existing federal legislation. For these reasons, it may be argued that NRTs constitute an appropriate matter for federal intervention under the national-concern branch of the POGG power.

Subject to constitutional limitations imposed by the Charter, recognition of a POGG-based federal jurisdiction over NRTs would enable Parliament to regulate the subject directly and comprehensively. particular, the federal government could establish policies and regulations aimed at the prevention of infertility, including the development of safe. accessible, and reversible contraceptives and the prevention and treatment of STDs and other causes of infertility. Regulatory intervention could occur at the level of primary prevention, research, and data collection; medical practices; and public education. The federal government also could regulate all aspects of assisted human reproduction, whether technology based, such as IVF and embryo transfer, or socially based, such as AI, surrogate motherhood, and adoption. The federal government could focus such intervention at the level of research, data collection, and information registration or at the level of development and use of methods of assisted human reproduction. With respect to prenatal diagnosis and genetics and embryo and fetal tissue research, the federal government could intervene at many levels, including establishing public review mechanisms or impactassessment processes, licensing participants and facilities, and creating a public-property regime in NRT research. Under the POGG power, Parliament also could determine the legal status of the embryo and fetus for purposes of federal law.25

#### The Spending Power

#### The Scope of the Spending Power

While it has attracted little judicial comment, Parliament's power to spend money raised through taxation and otherwise to dispose of public property provides the basis for federal initiatives such as shared-cost programs under the Canada Health Act<sup>26</sup> and the Canada Assistance Plan,<sup>27</sup> equalization payments to provinces, direct transfers to universities and municipalities, and grants to individuals.<sup>28</sup> The federal spending power is not specifically provided for in section 91, but it is inferred from the power over public property and the public debt under section 91(1A), the

taxing power under section 91(3), and the federal appropriations power under section 106.

From a policy perspective, federal spending in areas of provincial jurisdiction has been justified on grounds including the need to ensure basic public services across Canada as a right of citizenship, the need to compensate for interprovincial fiscal and economic disparities, and the need to ensure interprovincial mobility.<sup>29</sup> Federal spending has been criticized on grounds that it encourages provinces to participate in programs that do not meet their individual needs and priorities; that such programs have skewed provincial spending; and that conditions imposed on the receipt of federal funds amount to federal regulation of matters within exclusive provincial jurisdiction.<sup>30</sup>

The Supreme Court has made it clear that conditional federal spending<sup>31</sup> in areas of provincial competence, including employment training<sup>32</sup> and welfare,<sup>33</sup> is constitutionally permissible; however, the Court has yet to specify the limits of the federal spending power or the point at which such spending becomes impermissible regulation of provincial

matters.

The Alberta Court of Appeal examined the scope of the federal spending power in *Winterhaven Stables Ltd. v. A. G. Canada.*<sup>34</sup> In its decision, the Court of Appeal rejected the characterization of the Canada Health Act,<sup>35</sup> the Canada Assistance Plan,<sup>36</sup> and the Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, 1977<sup>37</sup> as legislation related to matters within exclusive provincial jurisdiction. In the Court's view, the laws establish "legitimate national standards."<sup>38</sup> It also dismissed the argument that financial incentives contained in the legislation and the pressure on provinces to participate in shared-cost programs amount to impermissible federal control of provincial matters.<sup>39</sup> In upholding these statutes' constitutionality, the Court of Appeal approved the trial judge's conclusion that the legislation does not relate to provincial matters, but provides financial assistance to the provinces to enable them to carry out their responsibilities. Further,

Parliament has the authority to legislate in relation to its own debt and its own property. It is entitled to spend the money that it raises through proper exercise of its taxing power in the manner that it chooses to authorize. It can impose conditions on such disposition so long as the conditions do not amount in fact to a regulation or control of a matter outside federal authority.<sup>40</sup>

The legitimacy of federal spending in the areas of health and welfare, in particular, is reinforced by the language of section 36(1) of the Constitution Act, 1982, which provides:

36.(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures,

together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.<sup>41</sup>

In keeping with the policy rationales for the exercise of spending power, section 36 is designed to constitutionalize a national commitment to the reduction of interprovincial disparities in access to the opportunities and services essential for individual and collective well-being, which increasingly are viewed as basic elements of citizenship.<sup>42</sup>

Federal Regulation of New Reproductive Technologies Under the Spending Power

The federal government can address many aspects of NRTs through use of its spending power. While the power cannot be exercised in a manner tantamount to regulation or control of a matter within exclusive provincial jurisdiction, conditional and unconditional grants to provinces, institutions, and individuals have been found constitutionally acceptable. On that basis, the federal government could directly engage in or subsidize research and programs directed at all aspects of NRTs. Recipients of conditional and unconditional federal grants and subsidies could include provincial governments, hospitals, community clinics, health care professionals, universities, public and private research centres and organizations, private and commercial providers of services and technologies, and individuals seeking access to such services and technologies. In the field of prevention of infertility, research and programs might include data compilation about potential causes of infertility, public education campaigns about reproductive-health risks, research into safe, accessible contraceptives, primary prevention of infertility, and improved medical practices.

Research and programs in the field of assisted human reproduction could include the establishment of public or government-subsidized registry systems, research into the short- and long-term consequences of use of NRTs, subsidies for further research and development of NRTs, support for education and training of related professionals, and subsidies enabling wider access to technological and social methods of assisted human reproduction. Programs relating to prenatal diagnosis and embryo and fetal tissue research also could be directly undertaken or subsidized. As suggested above, federal spending could occur on a conditional or unconditional basis. Parliament could authorize federal spending in relation to NRTs under new NRT legislation or under existing legislation, such as the Canada Health Act.<sup>43</sup> In particular, accessibility to NRTs as a

medical service could be guaranteed under the Canada Health Act, in accordance with its guiding principles.<sup>44</sup>

#### The Criminal Law Power

The Scope of the Criminal Law Power

The courts have granted Parliament considerable latitude in the exercise of its criminal law power under section 91(27). In the 1931 *PATA* case, Lord Atkin suggested that the validity of criminal legislation is to be measured by only one standard: "Is the act prohibited with penal consequences?" Subsequently, the courts have required that criminal law be directed at the suppression of "evil or injurious or undesirable effect[s] upon the public ... in relation to social, economic or political interests," that it be of a penal rather than of a broadly regulatory character, and that its exercise not amount to a disguised attempt to regulate matters unrelated to the criminal law. The courts have held that legislation adopted under section 91(27) can be preventive or punitive, that it can include dispensations or exemptions, and that it can provide for functionally related civil remedies.

The prevailing test for determining the validity of legislation enacted under the criminal law power was forwarded by Justice Rand in *Reference Re S. 5(a)* of the Dairy Industry Act in the following terms:

Is the prohibition  $\dots$  enacted with a view to a public purpose which can support it as being in relation to the criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law.  $^{52}$ 

Applying this test in *R. v. Cosman's Furniture (1972) Ltd.*, the Manitoba Court of Appeal held that the provisions of the federal Hazardous Products Act<sup>53</sup> regulating infant cribs are directed at safeguarding the health and security of infants and that the act is valid criminal law.<sup>54</sup> In *R. v. Wetmore*,<sup>55</sup> the Court upheld the provisions of the Food and Drugs Act<sup>56</sup> under the criminal law power, characterizing the act as guarding the public's physical health and safety. This view was confirmed by Justice Estey in *Labatt Breweries of Canada Ltd. v. A. G. Canada*.<sup>57</sup> In the 1976 *Morgentaler* decision, Justice Laskin held that it is permissible for Parliament to criminalize abortion as "socially undesirable conduct subject to punishment."<sup>58</sup> In the 1988 *Morgentaler* case, the majority reiterated the view that the abortion provisions of the Criminal Code,<sup>59</sup> aimed at protecting maternal health and fetal life, are a valid exercise of Parliament's criminal law power,<sup>60</sup> although the provisions violate section 7 of the Charter.<sup>61</sup>

### Federal Regulation of New Reproductive Technologies Under the Criminal Law Power

As suggested earlier, NRTs are matters relating to the national welfare. Research, development, and use of such technologies affect the

fundamental health and well-being of individual NRT users, of women collectively, and of the public. Research, development, and use of NRTs also raise complex moral, ethical, and social policy issues. As such, NRTs are a permissible matter for federal intervention under the criminal law

By means of the criminal law, Parliament can penalize those aspects of the research, development, and use of NRTs deemed harmful to public health and welfare. For example, Parliament can use its criminal law power to prohibit the development and use of NRTs in profit-making or nonregulated contexts, to prohibit the use of prenatal diagnosis for sex selection and other discriminatory forms of fetal screening, to prohibit the exploitation of persons involved in the provision or receipt of reproductive or gestational services, and to control the incidence and applications of embryo and fetal tissue research. Subject to constraints imposed by the Charter, 62 Parliament's ability to use the criminal law power in the area of NRTs is limited only by the requirement that it pursue public morality, health, safety, and welfare and that its intervention take a penal rather than a broadly regulatory form. 63 In other words, while the federal government cannot rely on the criminal law power to support complex regulatory intervention in relation to NRTs, the criminal law power will support an array of prohibitions and sanctions in this area.

#### The Trade and Commerce Power

#### The Scope of the Trade and Commerce Power

Unlike the criminal law power, the federal power to regulate trade and commerce under section 91(2) has received a relatively restrictive interpretation. Under section 91(2), the courts have held that Parliament may regulate interprovincial and international trade and commerce and general trade and commerce affecting Canada as a whole. In neither case, however, may Parliament regulate the affairs of a single trade or industry. 64 Thus, in Labatt Breweries of Canada Ltd. v. A. G. Canada, 65 Justice Estey struck down provisions of the Food and Drugs Act<sup>66</sup> and regulations prescribing standards for the production and sale of light beer on grounds that they regulate a single industry rather than "industry and commerce at large or in a sweeping, general sense."67 In R. v. Wetmore, however, Justice Laskin suggested that Food and Drugs Act provisions relating to the manufacture, marketing, and sale of pharmaceuticals can be upheld under the trade and commerce power.68

In the recent decision in General Motors of Canada Ltd v. City National Leasing<sup>69</sup> relating to the federal Combines Investigation Act, <sup>70</sup> Justice Dickson set out five considerations for determining the validity of federal legislation under the general trade and commerce power: (1) is the legislation part of a general regulatory scheme; (2) is the scheme continuously monitored by a regulatory agency; (3) is the legislation concerned with trade as a whole rather than with a particular industry;

(4) is the legislation of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) would failure to include one or more provinces or localities in the scheme jeopardize its success in

other parts of the country.71

As in the case of the national-concern branch of the POGG clause, the Court has emphasized the importance of maintaining the "delicate" balance of power between the federal government and the provinces in interpreting the trade and commerce power. To preserve the local autonomy envisioned in the Constitution, Justice Dickson argued in A. G. Canada v. Canadian National Transportation Ltd. that "measures validly directed at a general regulation of the national economy" must be distinguished from "those merely aimed at centralized control over a large number of local economic entities."72 In effect, the requirement that federal legislation be "different from anything that could practically or constitutionally be enacted by the individual provinces"73 is a central factor in assessing the constitutionality of federal legislation under the general branch of the trade and commerce power.

#### Federal Regulation of New Reproductive Technologies Under the Trade and Commerce Power

Pursuant to its power in relation to interprovincial and international trade and commerce, Parliament can regulate the international and interprovincial commercial aspects of NRTs, including the interprovincial or international activities of commercial bodies engaged in the research. development, and application of NRT-related products or services. particular, the federal government could regulate the import, export, interprovincial trade, and marketing of gametes, fertility drugs, and other new reproductive products, equipment, and services. The federal government also could regulate international or interprovincial commercial information registries.

Depending on the form and scope of legislation, the federal government could attempt to support comprehensive NRT legislation under the general branch of the trade and commerce power. As described by Justice Dickson in General Motors of Canada Ltd v. City National Leasing, however, such a regulatory scheme must meet several criteria to be found valid: (1) it must be subject to continuous overseeing by a regulatory agency; (2) it could not be directed at a single industry; (3) it could not be of a kind that the provinces are able to enact; and (4) the failure of one province or locality to participate in the scheme must jeopardize its success elsewhere. 74

Alternatively, the federal government could continue to regulate new reproductive products and services under existing legislation, such as the Food and Drugs Act<sup>75</sup> or the Competition Act.<sup>76</sup> In particular, the federal government could regulate drugs and medical devices used in the research, development, and application of NRTs, and it could regulate ownership and

advertising practices of commercial providers of NRTs.

#### **The Taxing Power**

#### The Scope of the Taxing Power

Section 91(3) empowers the federal government to raise money "by any mode or system of taxation." The federal government makes extensive use of its taxing power, primarily through the federal Income Tax Act, <sup>77</sup> to promote social policy objectives. <sup>78</sup> In *Reference Re Anti-Inflation Act*, Justice Laskin suggested that because of its plenary nature, "it would be an unusual case where this power, so apparently limitless, could be challenged as colourably used." Nevertheless, as with other heads of federal power, where a taxing statute is a disguised attempt to regulate a matter within provincial jurisdiction, it will be open to challenge. This was found to be the case in *Reference Re Employment and Social Insurance Act 1935*, where the Privy Council invalidated federal legislation levying unemployment insurance (UI) premiums because it related to "property and civil rights in the province, not taxation." <sup>80</sup>

## Federal Regulation of New Reproductive Technologies Under the Taxing Power

In addition to the enactment and use of spending legislation, the federal government also can resort to the existing personal and corporate income tax structure to intervene in the field of NRTs. For example, Parliament could adopt tax incentives for the research and development of contraceptive, fertility, and other NRT-related drugs, products, and services; tax subsidies for non-profit and commercial providers of services and information; and tax credits for individual NRT users. Such measures could be concluded in the federal Income Tax Act, 81 or in other federal tax legislation.

#### **The Treaty Power**

#### The Scope of the Treaty Power

The power to make international treaties is a prerogative belonging to the federal executive. In the 1932 "Radio Reference," the Privy Council held that the power to implement international treaties also falls within federal jurisdiction under the POGG clause. In the 1937 "Labour Conventions Reference," however, the Court concluded the opposite, that "there is no such thing as treaty legislation as such," and the power to pass legislation implementing international treaties is divided between Parliament and the legislatures according to the subject matter of the treaty in question. 4

The Court has since suggested, in *MacDonald v. Vapor Canada Ltd*, <sup>85</sup> that the "Labour Conventions Reference" decision may be open to review, and that Parliament may be empowered to pass treaty-implementing legislation in areas otherwise of provincial jurisdiction. The court emphasized in *Schneider v. R.*, however, that assuming Parliament does

have such power, its exercise "must be manifested in the implementing legislation and not be left to inference."  $^{\rm B6}$ 

Federal Regulation of New Reproductive Technologies Under the Treaty Power

If Justice Laskin proves correct in suggesting that the "Labour Conventions Reference" merits Court review, the treaty power could be used as an ancillary support for federal legislation designed to implement Canada's international treaty obligations in the field of NRTs.<sup>87</sup> In particular, Canada's obligations under the International Covenant on Economic, Social and Cultural Rights<sup>88</sup> and the International Covenant on Civil and Political Rights<sup>89</sup> could potentially lend support to legislation governing the availability of NRTs, as a means of promoting "the right of everyone ... to enjoy the benefits of scientific progress and its applications" and "the right of men and women ... to found a family," "without distinction of any kind, such as race, colour, sex, ... national or social origin, property, birth or other status."

# Provincial Jurisdiction in the Field of New Reproductive Technologies

#### Property and Civil Rights and Matters of a Local or Private Nature

Section 92(13) empowers the provinces to legislate with respect to "property and civil rights in the province," and section 92(16) authorizes provincial regulation relating to "generally all matters of a merely local or private nature in the province." The property and civil rights clause is the most important source of provincial constitutional jurisdiction, having largely supplanted section 92(16) as a residual category of provincial authority.

The provincial power over property and civil rights does not include civil rights in the constitutional sense of the rights and freedoms contained in the Charter, however, it authorizes provincial regulation of most legal relationships between individuals. In particular, section 92(13) grants the provinces jurisdiction related to property, contract, and tort and has been read by the courts as a source of provincial authority related to individual businesses and trades, contracts of employment, and employment conditions. In addition, section 92(13) gives the provinces power over family law, including child welfare, guardianship, custody, maintenance, legitimacy, affiliation, adoption, and succession.

Section 92(13) also has been interpreted as providing the provinces with general jurisdiction over public-health matters. In conjunction with the provincial licensing power under section 92(9), this jurisdiction includes the power to regulate the medical profession, medical practices, and health services, as well as the power over health insurance. With section 93, which grants the provinces exclusive power to legislate in

relation to education, section 92(13) also supports provincial regulation of medical and health education and training.

The courts have recognized a parallel federal health power under the POGG clause. In *Schneider v. R.*, <sup>102</sup> Justice Dickson upheld the British Columbia Heroin Treatment Act<sup>103</sup> on grounds that heroin addiction is neither a health problem beyond the coping power of the provinces nor a matter of national rather than local concern; thus, it is not within the jurisdiction of Parliament under the POGG clause. In their concurring judgments, however, Justices Laskin and Estey emphasized that there is a legitimate field of federal public-health regulation under the POGG power "directed to the protection of national welfare." <sup>104</sup> In Justice Estey's words:

"[H]ealth" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question. <sup>105</sup>

Justice Estey distinguished between the federal and provincial dimensions of health:

Legislation dealing with health matters has been found within the provincial power where the approach in the legislation is to an aspect of health, local in nature ... On the other hand, federal legislation in relation to "health" can be supported where the dimension of the problem is national rather than local in nature ... or where the health concern arises in the context of a public wrong and the response is a criminal prohibition.  $^{106}\,$ 

Thus, the *Schneider* case upheld the British Columbia Heroin Treatment Act as valid provincial legislation for the medical treatment of drug addiction, notwithstanding that the act provides for compulsory apprehension and treatment of addicts.<sup>107</sup>

On the other hand, in *Reference Re Freedom of Informed Choice* (*Abortions*) *Act*, <sup>108</sup> the Saskatchewan Court of Appeal held that the province cannot make it an offence to perform an abortion without the prior written consent of a pregnant woman's husband or parents because the law's object is to stiffen the existing criminal law in relation to abortions — a matter for federal jurisdiction. <sup>109</sup> Similarly, in *R. v. Morgentaler*, the Nova Scotia Court of Appeal found that the provincial Medical Services Act, <sup>110</sup> which prohibits the establishment of free-standing abortion clinics in Nova Scotia, is designed to fill the void created by the repeal of the therapeutic abortion provisions of the Criminal Code. As such, the legislation is in pith and substance criminal law; thus, beyond the power of the province to adopt. <sup>111</sup>

#### Hospitals

Section 92(7) empowers the provincial legislatures to legislate "the establishment, maintenance, and management of hospitals ... in and for the province, other than marine hospitals." Section 92(7) has been read with section 92(13) as a source of provincial authority over public health. Thus,

for instance, in *Carruthers v. Therapeutic Abortion Committees of Lions Gate Hospital*, the Federal Court of Appeal held that the establishment of therapeutic abortion committees as an aspect of hospital regulation and control and the performance of abortions are matters within provincial jurisdiction, subject to any federal criminal-law prohibitions.<sup>112</sup>

# The Subject Matter and Scope of Provincial Regulation of New Reproductive Technologies

If the view that NRTs represent a single, distinct legislative matter under the federal POGG power is rejected and the subject of NRTs is divided into its components, there is clearly considerable scope for

provincial regulation in this area.

Provincial jurisdiction over public health under the property and civil rights clause, combined with provincial jurisdiction over hospitals, gives the provinces *prima facie* authority with respect to NRTs as a health matter. Levels of new reproductive health and hospital services; health requirements relating to the research, development, and application of NRTs in hospital and non-medical settings; standards of medical ethics and practice; local public health education; and the insurability of NRTs under provincial health insurance plans would be matters of valid provincial concern.

Under the property and civil rights clause, the provinces are empowered to regulate the legal relationships that might arise through the research, development, and use of NRTs, including in the fields of tort, contract, and family law. For example, the provinces could adopt legislation governing surrogate motherhood and other contractual arrangements for the supply of reproductive and gestational services; the liabilities and obligations of individual and commercial providers of NRTs and related services under contract and tort law; the civil status of children born through the use of NRTs; the legal status of the fetus, embryo, and gamete under provincial law; and family and child welfare issues relating to support, custody, adoption, and succession.

The provinces also would be empowered to regulate the intraprovincial commercial activities of those involved in the research, development, and application of NRTs. Such matters would include advertising, information disclosure, record keeping, and other business practices. In addition, the provinces could regulate employment conditions and workplace reproductive hazards. Finally, pursuant to section 93, the provinces could intervene in this field through the provincial educational system.

## The Relationship Between Federal and Provincial Legislation

### The Relationship in General Terms

The existence of valid federal legislation on a particular topic does not affect the determination of whether provincial legislation regulating another

aspect of that topic is constitutional. Once a matter has been found to be within a class of subjects attributed to the provincial legislatures under section 92, a province may validly regulate it. For example, as discussed above, provinces may regulate abortion as a medical matter in the exercise of their powers over hospitals, property, and civil rights. This is true notwithstanding that abortion also is susceptible to parliamentary regulation under the federal criminal law power. 113

The existence of federal legislation becomes relevant to the constitutionality of provincial legislation only where there is potential conflict. In the case of valid but inconsistent statutory provisions at the federal and provincial levels, the courts have held that the federal law takes precedence, and the provincial law is rendered inoperative to the extent of the inconsistency. 114 Traditionally, however, the courts have been reluctant to find a conflict between valid federal and provincial legislation and to set aside provincial legislation on federal paramountcy grounds, unless an expressed contradiction exists.

In Multiple Access Ltd. v. McCutcheon, Justice Dickson described this situation in the following terms:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no;" "the same citizens are being told to do inconsistent things:" compliance with one is defiance of the other. 115

Recently, the Court has suggested that where provincial legislation is invoked in the presence of comprehensive federal legislation governing the same matter, "dual compliance will be impossible when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose."116 In addition, as the Court infers in Irwin Toy Ltd. v. Quebec (A. G.), Parliament may render a parallel provincial provision inoperative by an expressed declaration to that effect in the federal law. 117 Failing such a declaration, or in case of an actual conflict between the federal and provincial laws, both will stand.

### The Relationship in the Field of New Reproductive Technologies

If it is found that NRTs are a single matter for exclusive federal jurisdiction under the POGG power, the provinces will lose the ability to regulate those aspects that otherwise would have fallen within their jurisdiction, except in an incidental way. In other words, the provinces could not enact legislation dealing in pith and substance with NRTs, although the incidental effects of valid provincial legislation of general application would not be objectionable. Thus, for example, the provinces could not enact legislation aimed directly at regulating access to AI, IVF, or surrogate motherhood, qua NRTs. The provision of such technologies in the medical or hospital context would, however, continue to be subject to general provincial hospital and health legislation.

If the Court were to reject the argument that NRTs are a distinct legislative matter falling within the POGG power, Parliament could regulate various aspects of NRTs under its spending, criminal, and other powers. For example, the federal government could subsidize research and access to NRTs through its spending power or prohibit the development and use of certain NRTs through its criminal law power. Subject to constraints imposed by the Charter, the provinces could regulate those aspects of NRTs falling within their legislative jurisdiction over property and civil rights, hospitals, and related subjects.

Thus, for instance, the provinces could adopt legislation aimed specifically and directly at NRTs as a provincial health matter. Provincial regulation could address acceptable standards of medical ethics and practice in the field of NRTs, conditions of access to NRTs, and the

insurability of NRTs under provincial health plans.

Pursuant to their power over intraprovincial trade and commerce under the property and civil rights clause, the provinces could impose disclosure and other business practices on commercial providers of NRTs. It also would be open to the provinces to regularize the legal status of children born through the use of NRTs under provincial child and family law relating to affiliation, support, custody, and adoption and to regulate the legal relations surrounding surrogate motherhood.

As described, as long as provincial legislation in relation to NRTs is defensible under a provincial head of authority, it will remain valid notwithstanding the existence of federal legislation governing the same subjects. Only where provincial legislation conflicts with federal law, insofar as it is functionally incompatible with or frustrates the legislative purpose of federal legislation, will it be deemed inoperative. A provincial licensing scheme allowing for the establishment and operation of for-profit gamete banks, for example, would not be affected by federal legislation prohibiting the import and export of gametes. Commercial operators of gamete banks would be obliged to comply with both federal and provincial law; however, such a provincial licensing scheme would become inoperative in the face of comprehensive federal criminal prohibitions against all forms of commercial trade in gametes, embryos, and fetuses. In the latter situation, the operation and objectives of the provincial licensing scheme would conflict with federal criminal law; thus, it could not stand.

# 2. The Impact of the Charter on the Regulation of New Reproductive Technologies

### The Scope and Content of the Charter

While sections 91 and 92 of the Constitution Act, 1867 distribute legislative power between the federal and provincial governments, the

Canadian Charter of Rights and Freedoms creates obligations and sets limits on all governments in their dealings with individual citizens.

Charter rights and freedoms include freedom of conscience and freedom of expression under section 2; the right to interprovincial mobility under section 6; the right to life, liberty, and security of the person under section 7; and the right to equal protection and equal benefit of the law under section 15.

Section 27 requires the Charter to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Section 28 provides that, "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Section 32(1) provides that the Charter applies to Parliament, to the federal government, and to the provincial and territorial legislatures and governments.

Section 1 permits governments to subject Charter rights to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," while section 24(1) entitles anyone whose rights or freedoms have been infringed or denied to apply to the courts for an "appropriate and just" remedy.

Each of these provisions raises particular issues for the regulation of NRTs. For example, does the right to life, liberty, and security of the person under section 7 include the right to procreate and, if so, does it oblige the state to ensure that the right can, in fact, be enjoyed? Does the right to equal benefit and equal protection of the law under section 15 prohibit or require certain regulatory interventions in the field of NRTs? Does the Charter compel or prevent certain state-imposed limitations on the conduct of users and providers of NRTs? Beyond Parliament and the legislatures, who has the duty to comply with the Charter?

This paper addresses some of these issues below by reviewing Supreme Court and lower-court case law under the relevant Charter provisions and by assessing the Charter's potential impact on various interests involved with or affected by the development and use of NRTs.

#### The "Right" to Parenthood

The Charter gives rise to many questions relating to individual access to NRTs. For example, to what extent does the Charter create a "right" to parenthood? If such a right exists, what does it import? Does it entail the right to choose whether to conceive and bear a child by conventional biological means, without state intrusion, or does it also include a right to parenthood through the use of NRTs?

If a Charter right to parenthood includes access to NRTs, must these be state subsidized? Must they also be available free from other non-economic barriers, such as restrictions based on sexual orientation, age, or disability? Does the Charter create other guarantees in relation to NRTs for people with mental or physical disabilities?

## The "Right" to Biological Parenthood

Section 7 of the Charter provides that "everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof

except in accordance with the principles of fundamental justice."

The full extent of the protection provided by section 7 has not yet been decided by the courts. In particular, the range of interests included within "life, liberty, and security of the person" has not been determined. It also has not been clearly established whether section 7 provides a right to be free from government interferences with identified section 7 interests or whether it also guarantees the full enjoyment of such interests and imposes corresponding duties on governments to ensure access to them. Finally, it remains uncertain what limits the concept of "fundamental justice" imposes on the ability of governments to interfere with section 7 rights. For example, is the government required only to provide certain procedural safeguards, such as the right to be heard, before depriving an individual of his or her section 7 rights? Or does the notion of fundamental justice contain a more substantive standard, such that some deprivations of life, liberty, or security of the person can never accord with principles of fundamental justice?<sup>118</sup>

The Supreme Court examined the meaning of section 7 in the reproductive context in *R. v. Morgentaler*. A majority of the Court decided that, while protection of the fetus is a valid state interest, the abortion provisions of the Criminal Code violate pregnant women's rights to liberty and security of the person by interfering with their bodily integrity and by subjecting

them to serious psychological stress.

In her concurring opinion, Justice Wilson pointed out that a right to biological parenthood has been recognized under the due-process clause of the United States Constitution. In particular, Justice Wilson referred to the decision in *Skinner v. Oklahoma* in which the United States Supreme Court invalidated a state law authorizing the sterilization of certain persons accused of crimes, on the basis that such legislation "involves one of the basic civil rights of man." "Marriage and procreation are fundamental to the very existence and survival of the race." Justice Wilson also cited the Court's decision in *Eisenstadt v. Baird* in which the majority argued that the right to privacy under the Fourteenth Amendment of the United States Constitution includes "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

In her decision, Justice Wilson agreed expressly with the United States Supreme Court that procreative autonomy is a fundamental constitutional right, holding that section 7 of the Charter includes the right to choose to reproduce and, in particular, the right to have an abortion. <sup>125</sup> In this regard, Justice Wilson argued that taking the abortion decision away from a pregnant woman and putting it in the hands of a committee amounts to as serious a violation of her right to personal autonomy under section 7 as it would be to establish a committee to decide whether the pregnancy

should continue.<sup>126</sup> Justice Wilson's opinion on the issue of reproductive rights confirms the judgment of the Ontario Court of Appeal, which also held that the decision to bear children falls within the ambit of section 7.<sup>127</sup>

The relationship between section 7 and procreative rights also is raised in E. (Mrs.) v. Eve. In that case, it was argued that, by depriving a mentally incompetent woman of the right to procreate, a court-ordered sterilization would infringe on her rights under section 7. On the non-constitutional issue of whether the court should exercise its *parens patriae* jurisdiction to order the sterilization, Justice La Forest argued that:

The importance of maintaining the physical integrity of a human being ranks high in our scale of values, particularly as it affects the privilege of giving life. I cannot agree that a court can deprive a woman of that privilege for purely social or other non-therapeutic purposes without her consent. The fact that others may suffer inconvenience or hardship from a failure to do so cannot be taken into account. 129

While Justice La Forest refrained from deciding the constitutional question of whether the right to bear children is guaranteed under the Charter, he underlined the "growing legal recognition of the fundamental character of the right to procreate." <sup>130</sup>

A more restrictive view of section 7 was forwarded by Justice Lamer in *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* ("Prostitution Reference"). Justice Lamer argued that the interests protected by section 7 "are properly and have been traditionally within the domain of the judiciary," and that the restrictions on the liberty and security of the person that concern section 7 "are those that occur as a result of an individual's interaction with the justice system, and its administration." 133

If the Court accepts this narrower view of section 7, it is unlikely that parenthood as such will be recognized as a protected interest under section 7; however, as the majority decision in the *Morgentaler*<sup>134</sup> case indicated, even under a restrictive reading of the right to life, liberty, and security of the person, the Court may be prepared to prohibit certain state interferences with parental choices. Thus, for example, while the Court might not accept the argument that section 7 guarantees the right to become a parent, it may decide that the government may not use the threat of criminal sanction to curtail an individual's decision to conceive or bear a child.

If the Court adopts a broader conception of the right to life, liberty, and security of the person — such as the one forwarded by Justice Wilson in  $R.\ v.\ Jones,^{135}$  that it includes the "freedom ... to develop and realize [one's] potential to the full," "to plan [one's] own life," and "to make [one's] own choices for good or ill" — the right to become a parent  $per\ se$  probably will be protected.

There is no doubt that parenthood is a fundamental value in society. As Justice Wilson pointed out in the *Morgentaler* case, the choice to

procreate is one of the most basic, personal, and important decisions a person can make. A person's relationship with his or her children, as Justice Wilson argued in the *Jones* case, is also central to his or her sense of self and place in the world. The choice to reproduce and to become a parent, in biological or social terms, is intimately linked with notions of life, liberty, and personal security. As Justice Wilson concluded in the *Morgentaler* case, it warrants protection under any but the narrowest interpretation of section 7. The personal security is a security of the personal security.

A wider interpretation of interests included in the right to life, liberty. and security of the person probably also will lead to a wider view of the protection afforded by the "principles of fundamental justice" under section 7. Justice Lamer's restrictive interpretation of the right to life, liberty, and security in the "Prostitution Reference" was coupled with the narrow view that the principles of fundamental justice are those "that govern the justice system."141 In the Morgentaler case, however, Justice Wilson took the broader view that an interference with life, liberty, or security of the person that infringes another Charter right violates the principles of fundamental justice. 142 In the Jones case, Justice La Forest suggested for the majority that where a deprivation of section 7 rights results from the imposition of arbitrary standards, such as those extraneous to the policy they should promote, or from the application of those standards in a fundamentally unfair way, such as where the decision maker fails to examine the facts or to consider the affected person's representations fairly, that deprivation will be deemed to violate the principles of fundamental justice. 143

While Justice Lamer's interpretation of the principles of fundamental justice focussed primarily on deprivations of section 7 rights resulting from the application of criminal law, the latter interpretations would place greater limits on the government's ability to interfere with reproductive rights. For example, in Justice Wilson's analysis, interferences with the right to parenthood would not be permissible if they also violate the right to equal protection or equal benefit of the law under section 15, or the right to freedom of conscience or religion under section 2. In Justice La Forest's interpretation, legislative or administrative policies that restrict the right to parenthood on the basis of unfair or arbitrary processes or criteria also would violate principles of fundamental justice. 144

# The Right to Parenthood Through the Use of New Reproductive Technologies Under Section 7

Recognition of a right to parenthood through the use of NRTs also would depend on the scope and content given to the rights to life, liberty, and security of the person under section 7. If the right to parenthood by conventional biological means is deemed to fall within the scope of section 7, the right to parenthood through alternate means, including through assisted human reproduction, surrogate motherhood, and adoption, probably would enjoy similar recognition. The process of conception, gestation, and birth may be different in each case; however, the fundamental personal

decisions involved are essentially the same. In each case, the choice and the outcome are parenthood. Thus, the prohibition of resort to NRTs or the imposition of unreasonable restrictions on the availability of adoption would be subject to challenge under section 7.

## The Right to Parenthood Through the Use of New Reproductive Technologies Under Section 15

A willingness to recognize a right to parenthood through conventional biological means but not through the use of NRTs, or the imposition of different burdens or restrictions on parents of each class, raises additional issues under section 15 of the Charter.

Section 15(1) of the Charter provides:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.  $^{145}$ 

Like that of section 7, the scope of section 15 has not been established by the courts. In particular, the question of whether section 15 compels state action to ensure equality, or whether it only prohibits state action that creates inequalities, has not yet been decided. In *McKinney v. University of Guelph*, however, Justice La Forest suggested that for section 15 to come into operation, the alleged inequality must be one made by "law," in the sense of a statutory or discretionary power. <sup>146</sup> Further, in *R. v. Hess and Nguyen*, <sup>147</sup> Justice Wilson argued that failure by the legislature to provide Criminal Code protection for one class of potential victims, while another class is protected, is not the form of injustice that section 15(1) is designed to address. <sup>148</sup>

In *R. v. Turpin*, Justice Wilson described the purpose of section 15 as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society." She explained that to prove a violation of section 15, it is necessary (1) to determine whether the legislation in question creates a distinction that violates the right to equality before, equality under, equal protection of, or equal benefit of the law; and (2) whether that distinction is discriminatory in purpose or effect. Insofar as the second requirement of section 15(1) is concerned, Justice Wilson cited Justice McIntyre's decision in *Andrews v. Law Society of British Columbia*, in which he suggested that:

[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. <sup>150</sup>

Referring to Justice McIntyre's definition, Justice Wilson emphasized it is important to look at the impugned legislation and at the larger social,

political, and legal context to ascertain whether differential treatment will result in inequality or, conversely, whether in a particular context identical treatment will create inequality or foster disadvantage. <sup>151</sup>

In deciding whether the individual or group in question, while not expressly enumerated in section 15, is among those that the section is designed to protect, Justice Wilson pointed to "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice." On the basis of her analysis, Justice Wilson found that persons living outside Alberta who cannot elect to be tried by judge alone are not a disadvantaged group within the meaning of section 15, even though Alberta residents are eligible for such trials. Justice Wilson suggested, however, that province of residence sometimes may constitute grounds of discrimination under section 15. 153

The relationship between section 15 and reproductive rights has not been directly addressed by the Court. In *Brooks v. Canada Safeway Ltd.*, <sup>154</sup> however, Justice Dickson found that a company accident and sickness plan that denied benefits to pregnant employees violated the equality guarantees of the Manitoba Human Rights Act. <sup>155</sup> After referring to the significant disadvantages that women suffer because of their reproductive capacities, Justice Dickson concluded that, "it is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women." <sup>156</sup>

In the context of the claim that section 15 guarantees a right to parenthood through the use of NRTs, several arguments can be made. First, it can be argued that infertility, or the inability to become a parent by traditional biological means, constitutes a physical disability. consequence, persons seeking to become parents through the use of NRTs would enjoy the equality rights guaranteed by section 15(1) to the physically disabled. If this argument were accepted, the government could not discriminate against those claiming a right to parenthood through the use of NRTs. In Justice McIntyre's words, section 15(1) would invalidate laws or policies that impose "burdens, obligations, or disadvantages" not imposed on conventional biological parents or that withhold or limit access "to opportunities, benefits, and advantages available to other members of society."157 Thus, any attempt to restrict those seeking to become parents through the use of NRTs in ways that do not apply to conventional biological parents would violate section 15(1). Similarly, depriving those seeking to become parents through the use of NRTs of opportunities or advantages offered to other parents would be impermissible. To be upheld, measures having a differential impact on the basis of biological ability to become a parent must be justified by the government as a reasonable limit under section 1 of the Charter, as discussed below. 158

Second, it could be argued on the other hand that infertile persons, or those unable to become parents by conventional biological means, are

members of an analogous, non-enumerated class under section 15(1). To support this argument, it must be shown that such persons are subject to "social, political and legal disadvantage" similar to that suffered by members of groups specifically mentioned under section 15 or, in other terms, that they constitute a "discrete and insular minority." If such an argument were successful, those unable to become parents through traditional biological means would enjoy the same protection as the physically disabled or any other group enumerated in section 15(1).

### Reasonable Limits on the Right to Parenthood Through the Use of New Reproductive Technologies Under Section 1

Section 1 provides that Charter rights and freedoms are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Court has decided that, to successfully invoke section 1, the government must demonstrate that its objectives are sufficiently important to warrant overriding a constitutionally protected right, and that its chosen means are reasonable and demonstrably justified. The Court has insisted that the governmental measures must be rationally connected to their purpose, must impair the right or freedom as little as possible, and must be proportionate, insofar as their effects upon the protected right are concerned, to the governmental objectives pursued. 161

In *McKinney v. University of Guelph*, Justice La Forest suggested that the courts should apply the minimum impairment test with a greater degree of circumspection in areas outside the field of criminal law, where legislative decisions are based on "a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components." Citing his decision in *R. v. Edwards Books and Art Ltd.*, 163 Justice La Forest also proposed that where, in attempting to protect the rights of one group, the legislature imposes burdens on the rights of another, it "must be given reasonable room to manoeuvre to meet these conflicting pressures." 164

Parenthood through the use of NRTs raises social, ethical, and legal concerns that may be absent in the case of parenthood by traditional biological means. The question of whether a given restriction on the right to parenthood through the use of NRTs would constitute a reasonable limit under section 1 of the Charter might involve considerations that are absent in the case of parenthood by traditional biological means, and might in some circumstances lead to differing results.

As discussed, the impact of NRTs extends well beyond the individuals directly involved in their use. The research, development, and application of NRTs affect the prospective biological and social parents and the children born as a result of their use, women as a group, and society. The presence of these competing interests may well justify a range of restrictions or prohibitions on the right to parenthood through the use of NRTs. So long

as such restrictions reflect important governmental objectives and are rationally connected to them, they will be upheld under section 1.

Protecting the interests of women providing reproductive and gestational services, for example, may warrant the imposition of restrictions on those seeking to become parents through resort to surrogate motherhood. Statutory provisions ensuring the custodial and access rights of surrogate mothers might well be perceived as infringements upon the parental rights of the social parents, as might statutory prohibitions against contractual waivers of such rights. Nevertheless, under section 1, legislative safeguards of this nature might well be justified. So long as it can be shown that the legislature has studied the issue and that its intervention is rationally designed to protect surrogate mothers from interference with their own parental and other rights, such measures will be upheld under section 1.

Similarly, the rights of children born through the use of NRTs may warrant restrictions on the parental rights of their social and biological parents. For example, gamete screening for potential health and genetic defects might be permissible in the case of IVF or for those providing gametes for AI, although such screening might not exist in context of traditional biological parenthood. Further, in the case of adoption, the adopted child's interests may justify the state imposition of restrictions on the parental rights of those seeking to adopt. As Justice La Forest suggested in the *McKinney* case, in situations where legislatures engage in a difficult balancing of competing public and private interests, the courts will grant them reasonable latitude in their legislative choices in applying section 1.

# The Right to Parenthood Through Subsidized Access to New Reproductive Technologies

## The Right to Subsidized Access to New Reproductive Technologies Under Section 7

The issue of the right to government-subsidized access to parenthood through the use of NRTs becomes more difficult because it raises the question of whether section 7 of the Charter imposes any affirmative obligations on the state. As suggested, that section 7 may require the state to ensure that the rights to life, liberty, and security actually can be enjoyed has not been ruled out; however, existing Supreme Court case law appears to reflect the view that section 7 provides a guarantee against only state action, not inaction.

In the "Prostitution Reference," Justice Lamer asserted that section 7 comes into play only when state action threatens an individual's life, liberty, or personal security. In the *Morgentaler* case, Justice Dickson suggested that lack of access to therapeutic abortion services, and many other health services in rural areas, does not present a problem; rather, parliamentary action limiting women's access to such services gives rise to

a section 7 violation.<sup>166</sup> In the same case, Justice Wilson also spoke primarily in terms of controlling state action, stating that "the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass."<sup>167</sup>

The United States Supreme Court came to a similar conclusion in the reproductive rights context. In *Roe v. Wade*, the Court held that the dueprocess clause of the Fourteenth Amendment encompasses a woman's right to decide whether to have an abortion. <sup>168</sup> In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court reconfirmed its judgment in *Roe v. Wade* in the following terms:

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.  $^{169}$ 

In subsequent decisions in *Maher v. Roe*<sup>170</sup> and *Harris v. McRae*, <sup>171</sup> however, the Court upheld state laws denying Medicaid funding to poor women seeking therapeutic and non-therapeutic abortions, even though such funding is available for childbirth-related medical services. The Court explained its decision in the following terms:

Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.<sup>172</sup>

The Court concluded that while indigence may make it difficult or even impossible for some women to obtain abortions, this situation is not created by government regulation and does not give rise to a constitutional remedy.

The Supreme Court of Canada has made it clear that the Canadian and U.S. constitutions spring from different social, political, and legal traditions, and great care must be taken in applying U.S. jurisprudence to the Canadian Charter. As Justice Dickson explained in *R. v. Big M Drug Mart*: "the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts." 174

In contrast to the United States, Canada has a long tradition of positive state intervention in individual and collective social, political, and economic life. Canadians have come to see the state as having a positive obligation to ensure that all Canadians can enjoy the full benefits of citizenship, including access to health care and other programs that ensure an acceptable level of social well-being.<sup>175</sup> This view is reflected in part by the language of section 36 of the Constitution Act, 1982.<sup>176</sup> Unlike the United States Constitution, the Charter contains guarantees framed in positive terms.<sup>177</sup>

If the Canadian Supreme Court were to interpret the right to life, liberty, and security of the person in light of Canadian social-welfare traditions, a right to subsidized access to NRTs might be found. Such right might be recognized as a necessary component of an infertile person's right to parenthood. Alternatively, a right to subsidized access to NRTs might be found as an element of the right to security of the person, interpreted as entailing access to basic social and health care services. <sup>178</sup> In either event, the right could be effected through direct spending by Parliament or through existing provincial health insurance schemes. <sup>179</sup> In both cases, however, the impact of section 1 of the Charter must be considered.

In *McKinney v. University of Guelph*, the Court confirmed its willingness to allow Parliament greater latitude when the abridgement of Charter rights is the product of difficult social and economic choices relating to the allocation of government resources. 180 Clearly, a guarantee of subsidized access to NRTs would have substantial financial implications for the state, and would dictate certain health and research expenditures that otherwise might not be made. In the face of competing social, economic, and constitutional interests, a decision to limit the right to parenthood through subsidized access to NRTs might well be viewed as consistent with principles of fundamental justice under section 7, 181 or more easily justified as a reasonable limit under section 1.182

## The Right to Subsidized Access to New Reproductive Technologies Under Section 15

The question of whether section 15 of the Charter guarantees subsidized access to NRTs raises issues similar to those discussed with respect to section 7. The Court has not yet been called upon to decide whether section 15 imposes affirmative obligations on governments to ensure that Canadians are in fact equal; however, case law points to a requirement of some government action, whether of a legislative, regulatory, or policy nature, for section 15 to apply. 183

As discussed in detail below, once government decides to provide or to subsidize access to NRTs, it must do so in a non-discriminatory fashion. The question remains, however, whether section 15(1) compels the state to provide or to subsidize access to NRTs in the first place. For such an argument to succeed, it must be demonstrated that failure to subsidize access to NRTs for the infertile or for those who cannot become parents by traditional biological means amounts to discrimination within the meaning of section 15(1).

As Justice Wilson explained in *R. v. Turpin*, section 15(1) requires two things to be shown: (1) government action creates a distinction that violates the right to equality before, equality under, equal protection of, or equal benefit of the law, and (2) the distinction has a discriminatory purpose or effect.<sup>184</sup> Where the government fails to provide or to subsidize access to NRTs, the principal difficulty is that government inaction, rather than "law," creates the distinction between those who can and those who

cannot become parents through traditional biological means. Thus, it is possible to move on to the second stage of analysis only if the Court expands the notion of law under section 15 to include government inaction as well as legislation, regulation, or policy. As discussed, this requires proof of discrimination, in the sense of imposition of burdens or disadvantages, or limitation of opportunities or advantages available to other members of society.

In summary, the section 15 argument would be that government failure to ensure that those unable to become parents through conventional biological means can do so through the use of NRTs, as a basic, fully subsidized health service, limits opportunities enjoyed by other members of society. In particular, failure to subsidize access to NRTs deprives those unable to become parents through traditional biological means of the ability to become parents, and all of the benefits and advantages that parenthood entails in Canadian society. If this argument succeeds, it will fall to the government to convince the court that failure to subsidize access to NRTs nevertheless is a reasonable limit under section 1, for the reasons outlined above.

#### **Barriers to Access to New Reproductive Technologies**

Once NRTs are available as publicly or privately funded health services, many issues arise. For example, is the government obliged under section 15 of the Charter to remove any remaining barriers faced by those seeking access to them?<sup>185</sup> In particular, must it ensure that province of residence; social or economic condition; racial or ethnic origin; sexual orientation; marital, parental, or family status; age; and mental or physical disability do not impede access to NRTs?

Further, as a preliminary matter, to whom does the Charter apply in the field of NRTs? Are bodies other than the legislative and executive branches of government required to make their NRT-related policies conform with the Charter? If not, must governments act to ensure that the policies and practices of non-governmental bodies respect fundamental Charter guarantees?

## Application of the Charter to Non-Governmental Providers of New Reproductive Technologies

Section 32(1) provides that the Charter applies to Parliament, to the federal government, and to each provincial legislature and government in respect of all matters within their authority. The Court has made it clear that section 32(1) confines the application of the Charter to government action, and that it does not extend to cover private activity. Thus, the legislative and executive branches of government clearly must respect section 15. But what other policy makers or providers of NRTs also are bound by the Charter's anti-discrimination requirements?

In *McKinney v. University of Guelph*, a majority of the Court held that an entity such as a university is not part of government within the meaning

of section 32(1),<sup>187</sup> even though it operates under statutory authority, performs an important public service, is subject to extensive government regulation, and receives substantial public financial assistance. In Stoffman v. Vancouver General Hospital,<sup>188</sup> the Court rejected the argument that a medical staff regulation requiring mandatory retirement at age 65, approved by the Vancouver General Hospital's board of directors and subsequently by the minister of health, violates section 15. The majority held that, although hospital services are an important part of the provincial legislative mandate, the hospital itself is not part of government, and the provision of health care does not qualify per se as a governmental function within the meaning of section 32(1).<sup>189</sup> As a result, the majority held, the hospital's policies and regulations are not subject to Charter review.

While the Court might reach a different decision with respect to hospital policies relating directly to patient care, the outcome in the *Stoffman* case suggests that the Charter's reach in the area of NRTs may be limited. In particular, the case suggests that non-governmental providers of NRTs, such as public and private clinics or individual

physicians, may not be held accountable under the Charter.

The argument that the government must nevertheless act affirmatively, through adoption of legislation and policies ensuring non-discriminatory access to NRTs, presents difficulties similar to those discussed with respect to compulsory government subsidization of NRTs. Such argument assumes that the government must act affirmatively to remove barriers to inequality, even though such barriers may not be directly of its own making.

If the government chooses to subsidize users of NRTs under existing health insurance plans, however, or takes any other legislative or policy initiative to facilitate access to NRTs, such action clearly will be subject to section 15 review. As the Federal Court of Appeal's decision in *Schachter v. Canada* demonstrated, a policy, program, or statute that is underinclusive, in the sense of excluding particular groups, will be susceptible to section 15 review in the same way as an outright denial of a benefit on discriminatory grounds. <sup>190</sup>

Barriers Relating to Province or Region of Residence

It is clear from the Court's judgment in *R. v. Sheldon S.*<sup>191</sup> that interprovincial variations or inequalities in access to benefits resulting from the application of provincial legislation or policy cannot be challenged on section 15 grounds. As Justice Dickson explained, a contrary result would be inconsistent with the basic principles underlying Canadian federalism; however, the Court has not dismissed the possibility that provincial differences resulting from the application of federal law might violate section 15. The same will be true for regional differences created by federal law or policy. Interprovincial variations in the accessibility of NRTs would have to be challenged on grounds that residents of provinces or regions where the availability of such services was poor or non-existent are victims of discrimination on the basis of province or region of residence.

Demonstrated inequalities in access to federal decision making in general, and to the health and social welfare policy-making process in particular, would be relevant factors in such an argument, as would be historic inequalities in availability of health and other federally subsidized services.

The argument that interprovincial variations in access to NRTs violate section 15 is supported by the language of section 6(3)(b) of the Charter, which prohibits unreasonable provincial residency requirements for the receipt of publicly provided social services. Such claims also would gain strength from the language of section 36, which, as discussed, entrenches a commitment on the part of all governments to promote equal opportunities for the well-being of Canadians and to provide essential public services of reasonable quality to all Canadians. 193

#### Barriers Relating to Social or Economic Condition

Barriers to access to NRTs based on social and economic conditions probably will be susceptible to challenge under section 15, since socially and economically disadvantaged people possess many of the same attributes as groups specifically enumerated in section 15. However, the argument that governments must fully subsidize access to NRTs, so that those with limited financial means are not prevented from becoming parents if they cannot do so through traditional biological means, presents the interpretive difficulties discussed earlier. 194

Similar problems are raised by the claim that, where many Canadians lack access to basic health care, the decision to provide public funding for NRTs violates the equality rights of the socially and economically disadvantaged. An affirmative decision to refuse access to NRTs to a person because of his or her social or economic condition, on the other hand, undoubtedly would contravene the equality guarantees set out in section 15(1). Proof of systemic discrimination in providing NRTs to the socially and economically disadvantaged also would constitute the basis for a section 15 challenge. 195

#### Barriers Relating to Race or Ethnicity

Section 15(1) of the Charter expressly prohibits discrimination on the basis of racial or ethnic origin. Denying access to NRTs on the basis of race or ethnicity would contravene section 15(1). The more difficult issue is whether publicly subsidized access to NRTs in the face of government failure to adequately provide other services of greater benefit or need to members of racial or ethnic minorities violates section 15. The success of such claim, as suggested with respect to the adequacy of health services for the socially and economically disadvantaged, would depend on the scope of the obligations imposed on the state by section 15.

General denial of access to a reproductive technology sought predominantly by members of a given ethnic or racial minority also might give rise to section 15 concerns. As in other cases, the ability to prove the discriminatory effect of denial of service, and the weight accorded to competing social or constitutional interests under section 1 of the Charter, would be crucial to the outcome of a challenge.

### Barriers Relating to Sexual Orientation

Like socially and economically disadvantaged persons, homosexuals possess many of the characteristics of groups specifically enumerated in section 15. Thus, sexual orientation probably will be recognized by the Court as prohibited grounds of discrimination under section 15(1). 4s a result, any denial of access to NRTs based on the sexual orientation of the person seeking to provide or benefit from the technology will be unconstitutional. In particular, the view that AI should be available only as a response to male infertility, rather than as a means of expanding women's reproductive choices, if reflected in government legislation, policy, or practice, would be susceptible to section 15 review. Similarly, defining Al as a medical practice that can be performed only by physicians or in medical settings (notwithstanding its minimal health risks), thus permitting individual physicians and reproductive clinics to discriminate against those seeking the service on the basis of their sexual orientation, also would be subject to section 15 challenge. To survive, such policies, like other section 15 violations, would need to be justified under section 1 as reasonably and demonstrably necessary to protect competing societal interests.

### Barriers Relating to Marital, Family, or Parental Status

Marital, family, and parental status can be seen as grounds of discrimination analogous to those expressly included under section 15. Marital status, in particular, is a prohibited grounds of discrimination under all Canadian human rights codes. Family status also is protected in many provinces. Statutory provisions discriminating against individuals on the basis of their marital, family, or parental status also have been found contrary to section 15 by lower courts. Thus, it can be argued that restricting an individual's access to NRTs on the basis of his or her marital, family, or parental status violates section 15 and is impermissible without justification under section 1.

### Barriers Relating to Age

Section 15 prohibits discrimination on the basis of age in specific terms; however, in the *McKinney* case, Justice La Forest argued that there are important differences between age discrimination and the other grounds mentioned in section 15. He contended:

[W]hile we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits.<sup>200</sup>

Conditions of access to NRTs based upon the applicant's age would contravene section 15. Justice La Forest's reasoning suggested, however, that so long as the demand for access to NRTs exceeds the available supply

and NRTs represent a scarce resource in health and social terms, barriers relating to age may be more easily justified under section 1 than restrictions based on other prohibited grounds. As Justice La Forest underlined, however, such rationalizations cannot be based upon inaccurate preconceptions about the relationship between age and ability — in this case, between age and physical or social aptitude for parenting.

### Barriers Relating to Mental or Physical Disability

Physical and mental disability are expressly prohibited grounds of discrimination under section 15(1). Thus, denying persons with physical or mental disabilities access to NRTs would violate section 15(1). An argument also could be made that certain forms and uses of NRTs undermine the equality rights of the physically and mentally disabled. To succeed, the discriminatory impact of the technology in question on persons with disabilities, whether in direct or systemic terms, must be demonstrated. Where such discrimination could be demonstrated, access to the technologies that is subsidized, controlled, or sanctioned by government would need to be justified as a reasonable limit on the equality rights of the disabled under section 1 of the Charter.

# Rights of Those Involved in the Provision of New Reproductive Technologies

#### Rights of Surrogate Mothers

As biological and/or gestational mothers, surrogate mothers enjoy the same constitutional guarantees under sections 7 and 15 of the Charter as other biological mothers and parents. That they have entered into private prenatal contractual arrangements with the eventual social parents of the fetus does not alter or reduce their constitutional rights insofar as reproductive autonomy and parenthood are concerned. As a consequence, state-imposed limitations on surrogate mothers' reproductive and parental rights will be subject to Charter scrutiny. For example, legislative requirements that surrogate mothers be subject to judicial screening for physical, mental, and social suitability and that they be judicially compelled to surrender their biological or gestational children upon birth clearly would violate sections 7 and 15 of the Charter.

Like other alternative reproductive methods, however, surrogate motherhood involves competing social and constitutional interests. Essentially, surrogate motherhood involves the purchase and sale of women's reproductive services. The fact that it occurs through the medium of private contract law shields the practice from scrutiny for harm to the reproductive, parental, and broader social rights of the individual women involved. For example, contractual provisions relating to medical surveillance of surrogate mothers during pregnancy, and to irrevocability of consent to the transfer of custody to the social parents, would, if statutorily imposed, violate fundamental constitutional rights.

The fact that surrogate motherhood occurs within the private sphere of contract law also disguises its wider social significance for women. In particular, the extent to which the availability of surrogate motherhood perpetuates images of women's proper role in society and heightens the risk of exploitation for socially and economically disadvantaged women goes unexamined. These considerations are relevant to the constitutional justifiability of limits on the practice of surrogate motherhood. For example, statutory measures providing for judicial non-enforceability of certain contractual stipulations, for non-enforceability of such contracts in general, or for statutory prohibitions against third-party, for-profit activities in the sphere of surrogate motherhood could be defended under section 1. 205

Given the debate over the scope and meaning of the guarantees contained in sections 7 and 15 of the Charter, it is unclear whether the government has an obligation to adopt statutory measures aimed at protecting women's rights in the surrogate motherhood context. For example, does the government have a duty to ban third-party, for-profit activities in this area or to establish statutory waiting periods for transfer of custody of the child after birth, similar to those existing in the adoption context? Pursuant to the Court's decision in R.W.D.S.U. v. Dolphin Delivery Ltd., 206 the constitutional reviewability of a judge's decision to enforce the terms of a private contract, notwithstanding the negative impact it may have upon the surrogate mother's reproductive, parental, and social rights, also is in doubt.

#### **Rights of Gamete Donors**

Because their decision-making and reproductive capacities are involved, egg and sperm donors enjoy similar constitutional guarantees to those of other biological parents. Thus, restrictions on the reproductive rights of gamete donors would be subject to scrutiny under sections 7 and 15 and to justification under section 1 of the Charter.

For example, legislatively sanctioned screening of gamete donors for race, social condition, or sexual orientation would constitute *prima facie* section 15 violations; however, limitations on the rights of gamete donors might be justified where these were designed to protect competing constitutional or social interests. As a result, screening of gamete donors for genetic and health risks, statutory obligations to disclose relevant health information in the interests of children, and controls on for-profit activities in the interests of socially and economically disadvantaged donors could be found justifiable within the meaning of section 1.

Case law suggests that gamete donors' concerns regarding privacy and consent also merit constitutional attention. The Court has recognized that sections 7 and 8<sup>207</sup> of the Charter protect individuals from "unjustified state intrusions upon their privacy."<sup>208</sup> It has defined privacy as "the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself."<sup>209</sup> In *R. v. Dyment*, Justice La Forest argued:

In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.<sup>210</sup>

On that basis, legislative measures providing for release of identifying information about gamete donors to third parties or to the state without their prior knowledge or consent may be subject to Charter review under sections 7 and 8. Measures involving the use of information, such as might be required to establish an effective records linkage system, where the prior consent of the gamete donor had not been obtained would need to be justified under section 1. This justification could be based on the need to protect other social and constitutional interests, such as the rights of children born through the use of NRTs to know their medical histories and cultural origins. It is unlikely, however, that release of non-identifying information about gamete donors would be subject to similar Charter scrutiny. Any constitutional restrictions also would cease to apply where the gamete donor's consent had been obtained. In other words, while sections 7 and 8 would not guarantee the right to donate gametes anonymously, they would guarantee the right not to have a promise of anonymity revoked after the donation.

An argument also can be made that section 7 of the Charter entitles gamete donors to control the ultimate use of their gametes and, in particular, requires the prior consent of gamete donors to any taking of their gametes, as well as to any previously unauthorized use of their gametes. Such a right would appear to be implicit in the notion of reproductive choice and autonomy, recognized by Justice Wilson in the *Morgentaler* case. The right to control the ultimate use of one's gametes would apply, for example, to a third-party decision to use gametes or the resulting embryo for experimental purposes when the donor's original intention was that the gametes be used only for purposes of conception. The right also would apply in the case of collection and use of supplementary gametes without the donor's consent.

#### Rights of Physicians and Commercial Providers of New Reproductive Technologies

The Court has decided that sections 7 and 15 of the Charter guarantee the rights of only physical persons, not corporate persons. To date, the Court has hesitated to accept the view that section 7 of the Charter protects purely economic interests. With the possible exception of advertising, where certain freedom of expression guarantees have been recognized, the is unlikely that regulation of the corporate or commercial activities of providers of NRTs will be subject to constitutional constraint. Thus, for example, prohibition of for-profit activities in some or all aspects of the research, development, and use of NRTs would be permissible, as would

any government-imposed regulatory limits. Regulation of false, misleading, or socially harmful advertising also would be permissible, whether in the interests of individual users of NRTs, or the public generally.<sup>215</sup>

It also is unlikely that physicians and other health care professionals involved in providing NRTs will be protected from regulatory intervention by section 7. <sup>216</sup> In Wilson v. British Columbia (Medical Services Commission), the British Columbia Court of Appeal held that while section 7 protects the right of physicians to practise their profession in the province, regulation of standards of admission, mandatory medical malpractice insurance, and standards of practice and behaviour clearly would not infringe section 7. <sup>217</sup> Similarly, in Charboneau v. College of Physicians and Surgeons of Ontario, <sup>218</sup> the Ontario High Court decided that a physician's section 7 rights were not infringed when patient records were examined by a peer-assessment program. Thus, it would be open to the government to regulate all aspects of medical practice in the field of NRTs, including standards of disclosure and consent, liability for misrepresentation and negligence, maintenance and disclosure of records, collection of statistical information, and prohibition against discriminatory screening and other practices.

#### Rights of the Fetus, the Embryo, and the Gamete

Under both Quebec civil and anglo-Canadian common law, the fetus has no legal rights until it is born alive. The question of whether the fetus enjoys constitutional rights under the Charter has not yet been answered by the Court. As mentioned, while a Court majority in the Morgentaler case recognized that in the later stages of pregnancy the state might justify limits on a pregnant woman's reproductive rights under section 1 of the Charter, it refrained from deciding the issue of the constitutional status of the fetus.

The question of fetal rights under sections 7 and 15, however, was raised directly in *Borowski v. Canada (A. G.)*<sup>221</sup> and in *Tremblay v. Daigle.*<sup>222</sup> In the *Borowski* case, the plaintiff argued that section 251 of the Criminal Code, which was found unconstitutional in the *Morgentaler* case, violated the fetus's right to life under section 7. On appeal from the lower courts' decision that the fetus was not protected by section 7,<sup>223</sup> the Court held that the plaintiff had lost his standing to raise the issue since (1) the therapeutic abortion provisions of the Criminal Code were no longer in force and could not be challenged under section 52(1) of the Constitution Act, 1982, and (2) infringement of a person's Charter rights was required to base a claim under section 24(1) of the Charter.

In *Tremblay v. Daigle*, the Court pointed out that the fetus was not a legal person for purposes of Quebec civil law, <sup>224</sup> the common law, <sup>225</sup> or the Quebec *Charter of Human Rights and Freedoms*, <sup>226</sup> and that the same situation prevailed in the United Kingdom, Australia, and under the European Convention. <sup>227</sup> The Court also rejected the argument that a father's contribution to conception gave him the right to interfere with a

mother's decisions regarding the fetus.<sup>228</sup> In considering the issue of fetal rights, the Court stated, "A foetus would appear to be a paradigmatic example of a being whose alleged rights would be inseparable from the rights of others, and in particular, from the rights of the woman carrying the foetus."<sup>229</sup> The Court declined to resolve the question of the constitutional status of the fetus under the Charter.

While the Court has not ruled on whether the fetus is protected under sections 7 and 15 of the Charter, it has concluded that protection of fetal life may justify certain limits on other constitutional rights, including the right to reproductive autonomy, pursuant to section 1 of the Charter. The Court has recognized, however, that the question of fetal rights is intimately related to the issue of women's rights; the status of the fetus cannot be determined in isolation from its mother's interests. Insofar as the rights of the fetus, embryo, and gamete in relation to research, development, and application of NRTs are concerned, these findings have numerous repercussions.

Since the Court has recognized a state interest in fetal life only in the later stages of pregnancy, it probably will not be prepared to find that the fetus enjoys full section 7 and 15 rights at all stages of development and, therefore, that such rights impose obligations and constraints on the state in regulating NRTs.

It is also unclear whether, given the legal status of the fetus in civil and common law and in light of competing religious, ethical, and biological notions of personhood and of when life begins, 230 the Court will find that the fetus enjoys independent Charter rights at any stage of development before birth. Rather, like the United States Supreme Court, 231 the Court may decide that the fetus is not a person for constitutional purposes, and that the interest in fetal life can be forwarded by the state only to justify limiting other constitutional interests, including the pregnant woman's rights under section 7 and women's individual and collective rights under section 15.

Finally, it is unlikely that the Court will accept the proposition that the gamete and the embryo, given their state of physical development and conventional legal conceptions of personhood, are protected by the Charter, such that their constitutional interests must be considered in regulating NRTs.

The *Daigle* case suggested that paternal consent requirements in the field of NRTs, whether in the interest of biological or social fathers, may be suspect, and that fathers lack the necessary judicial standing to raise legal and constitutional claims on behalf of the fetus. The *Morgentaler* case, however, suggested that the state may defend legislation adopted to protect fetal interests under section 1 of the Charter where such legislation interferes with other constitutional rights. Thus, the state could restrict the use of fetal sex-selection techniques and the application of other NRTs, even though such restrictions might interfere with reproductive and parental rights under section 7 or 15 of the Charter. Where the research,

development, or application of NRTs does not give rise to competing constitutional interests, it is clear that the government's ability to intervene in the name of the fetus, gamete, or embryo is unrestricted. For example, the government's power to regulate or prohibit fetal experimentation; to establish public property regimes in the field of fetal, gamete, or embryo research; or to control other uses of the fetus, embryo, or gamete not involving reproductive, parental, or other Charter rights is unrestricted from a constitutional point of view.

# Rights of Children Born Through the Use of New Reproductive Technologies

At birth, a child gains the full protection of the Charter. In particular, it can be argued that a child has the right under sections 7 and 15 to information about his or her biological, medical, and cultural background. In many cases, such information will be necessary to protect the child's physical health — an interest recognized by the Court under section 7 of the Charter. Such information also is important to the child's sense of self and of his or her place in the world — values alluded to by Justice Wilson in the *Jones* case. To the extent that statutory provisions exist for such information to be released to adoptive children, section 15 also guarantees similar access to children born through the use of NRTs. Thus, legislative measures providing for the withholding of information related to the child's medical and social background would need to be justified under section 1 as necessary to maintain the viability of gamete donation programs or to protect competing constitutional interests, such as the privacy rights of gamete donors.

A more difficult issue is the extent to which sections 7 and 15 of the Charter require the state to act to protect children born through the use of NRTs from any health or other dangers presented by these technologies and, in particular, to minimize the risk of their commodification. Under a more restrictive reading of sections 7 and 15, an affirmative answer to this question is unlikely; however, the state interest in preventing commodification of children may be relevant in analyzing the reasonableness of state interferences with parental or reproductive rights under section 1 of the Charter. Similarly, section 1 will permit the state to raise the constitutional interests of children born through the use of NRTs to justify other limits on parental or reproductive rights, such as prohibiting prenatal screening for sex selection or other discriminatory purposes.

# Impact of the Charter on Government Regulation of New Reproductive Technologies

Access to the Policy-Making Process in the Field of New Reproductive Technologies

As suggested, it is not yet determined what affirmative obligations are imposed by sections 7 and 15 on governments to ensure that individuals may fully enjoy the rights contained in these sections. In particular, it is unclear what, if any, level of public participation in government decision making involving life, liberty, security, or equality-related interests is required. Insofar as the right to life, liberty, and security of the person is concerned, an argument can be made that the notion of fundamental justice in section 7 necessarily entails a participatory element. In administrative law terms, natural justice, or due process, traditionally has required that a person threatened by a government decision or action have an opportunity to be heard by the decision maker before the decision is taken. The requirement of due process has been described as "one of the conditions of moral acceptability of those institutions that give some people power to control or intervene in the lives of others." As another author puts it:

Procedure is not primarily a way of confining government within the limits of rules. Instead, it is seen as a structure of opportunities for participation and criticism, allowing affected persons to challenge and influence official policy.<sup>237</sup>

Transposed into the section 7 context, this reasoning suggests that government policy making in areas involving life, liberty, or security-related interests must allow for participation by potentially affected individuals or groups in the decision-making process. As in the administrative law setting, the participation by affected parties in governmental decision making relating to fundamental interests is necessary for those decisions to be perceived as fundamentally just.

Similar reasoning can be applied to section 15 of the Charter. Guarantees of equality before the law and equal benefit of the law, as interpreted by the Court, comport notions of political efficacy and social and political citizenship.<sup>239</sup> Exclusion from political decision making and inability to have one's interests recognized by the policy-making process are traditional hallmarks of the disadvantaged groups for whose benefit section 15 was adopted. Thus, section 15 can be read to require the full participation of all groups, and not merely the historically privileged, in the policy-making process, particularly when it touches upon fundamental interests and rights.<sup>240</sup>

Given the importance of NRT-related issues and the nature of the individual, group, and collective interests involved, it can be argued that participation by affected parties in policy-making and regulatory processes involving NRTs is not only desirable from a policy perspective, but also

constitutionally required. At a minimum, an effort should be made to ensure that decisions involving research objectives and methods, information gathering, medical practices, access, and availability of NRTs are open to participation by members of the medical and research communities, by users of NRTs, and by those groups such as the infertile, women, and the disabled whose interests are most at risk. Participation should extend beyond the immediate questions of how, for whom, and by whom NRTs are to be developed and applied. It should extend to broader policy issues, such as the priority of NRTs over other possible health and research expenditure choices and the relative merits of public over private or commercial control of NRTs. In addition, the government should foster or require similar levels of participation in non-governmental decision making relating to NRTs where it has the potential to affect the constitutional interests of individual providers and users of NRTs or of the public.

#### Women's Rights and New Reproductive Technologies

Under sections 7 and 15 of the Charter, women have a particular claim to participation in policy making, regulation, and control of NRTs.<sup>241</sup> This claim is reinforced by the language of section 28, which guarantees the rights and freedoms contained in the Charter equally to women and men.<sup>242</sup> NRTs have reproduction as their primary object. As such, they are of fundamental concern to women as individuals and as a group. At the same time, however, women have not traditionally been involved in the research, development, or application of NRTs. They have not had an opportunity to define standards of access, practice, or consent, and they generally have been excluded from public and private policy making in science, medicine, and health.

As the Court acknowledged in its interpretation of the equality rights provisions at issue in Brooks v. Canada Safeway, 243 women historically have been defined primarily in terms of their reproductive capacities. Because of this role, women have suffered significant economic, legal, and political disadvantage. As Justice Dickson recognized, the social significance of reproduction cannot be overlooked if women are to achieve meaningful equality. The rights contained in section 7 also have particular import for women, insofar as reproduction is concerned. As Justice Wilson pointed out in R. v. Morgentaler, women's reproductive capacity forces them to make choices that men need not and cannot make.244 While such choices go to the essence of "individual dignity and autonomy," they are subject to social control and, often, to legal coercion. As the majority in Morgentaler accepted, this situation is inconsistent with the values reflected in section 7, which entitles women to make reproductive choices consistent with their own priorities and aspirations rather than those of third parties or the state.

In summary, sections 7, 15, and 28 of the Charter demand that particular attention be paid to women's views and interests in decision making about and application of NRTs. In particular, the following issues

are among those that require an analysis and response that reflect women's needs and perspectives: workplace reproductive hazards and how they are dealt with; the reasons why women delay childbearing, thereby increasing their risk of infertility; the relationship between infertility and the safety of existing contraceptives; the need for greater availability of data on the longterm effects of NRTs, so women can make informed choices about them: prenatal screening, including its use for sex selection; and the problem of discrimination in providing NRTs, including discrimination based on marital status and sexual orientation.

## 3. The Potential Impact of Future Constitutional Arrangements on the Regulation of New Reproductive **Technologies**

The constitutional structure devised by the Fathers of Confederation in 1867 has been the subject of steady comment and review by governments, policy makers, and the public since the late 1960s. With the failure of the Meech Lake Accord<sup>245</sup> in June 1990, however, the issue of Canadian constitutional change has taken on new urgency. The debate has focussed primarily on the responsiveness of central institutions to regional needs, the problems created by the existing federal-provincial division of powers, and, since the adoption of the Charter in 1982, the appropriate scope of constitutional protection for individual rights and freedoms. As discussed below, the call for a reallocation of federal-provincial legislative authority and an expansion of Charter guarantees has potential implications for the regulation of NRTs.

### Changes to the Existing Division of Powers

#### The Peace, Order, and Good Government Power

A set of proposals relevant to federal regulation of NRTs involves the POGG power. Like the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (the Molgat-MacGuigan Committee), 246 the recent federal working paper recommended that the federal government maintain its authority to deal with national matters and emergencies, but authority over residual matters of a non-national nature, not specifically assigned to the federal government under section 91 or by the courts, be transferred to the provinces.<sup>247</sup> As the discussion in Part 1 makes clear, this distinction is less significant than it first appears, since the Supreme Court has suggested that, to be attributed to the federal government under the POGG clause, new matters must meet the same criteria as those of national concern. 248 Under the recent federal proposals, the federal government could claim that NRTs are subject to federal jurisdiction under the national-concern branch of the POGG power.

#### The Federal Spending Power

As discussed in Part 1, the federal government has used its spending power extensively since the end of World War II to create shared-cost and other programs, particularly in the fields of health and welfare. The perception that the spending power has permitted substantial federal encroachment into areas of exclusive provincial jurisdiction has generated ongoing demands by Quebec and other provinces for its containment or repeal.

In its 1972 final report, the Molgat-MacGuigan Committee recommended that the federal government's power to create new shared-cost programs and continue existing ones be subject to legislative approval in three of the four regions of Canada, and that any province choosing not to participate be entitled to compensation. Section 7 of the Meech Lake Accord would have amended the Constitution Act, 1867 to include the following:

106A. (1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.<sup>251</sup>

In Shaping Canada's Future Together, the most recent federal working paper on constitutional reform, the government insisted that it must retain the power to make direct payments to individuals and organizations and to make transfer payments to provinces, especially in the field of regional development. It recommended, however, that a constitutional amendment be adopted that would subject new national shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction to approval by at least seven provinces representing 50 percent of the Canadian population. The amendment also would provide for reasonable compensation to provinces that establish programs meeting national objectives, rather than participating in new national programs.

Given the long history of constitutional discussions relating to federal spending power in areas of exclusive provincial jurisdiction, substantial provincial approval probably will be required as a political, if not constitutional, precondition to establishment of any new national shared-cost program in the field of NRTs. Neither the Meech Lake Accord nor the recent federal proposals, however, recommend limiting the federal government's ability to exercise its spending power to make direct grants to individuals and organizations or to make unconditional grants to the provinces. Only the recent Commission on the Political and Constitutional Future of Quebec (the Bélanger-Campeau Commission) went this far, suggesting that federal spending and overlapping interventions in areas of exclusive Quebec jurisdiction should be eliminated, and that Quebec should be granted exclusive legislative authority in relation to its social,

economic, cultural, and linguistic development as part of any new effort to restructure Canada's federal system.  $^{255}$ 

Adoption of recommendations equivalent to those in the Bélanger-Campeau report obviously would limit federal jurisdiction in the fields of health and welfare in general and federal regulation of NRTs in particular. Under previous federal-provincial and current federal proposals related to the spending power, however, the federal government's ability to intervene in the area of NRTs through direct grants to individuals and organizations and unconditional grants to provinces would remain unfettered. Under the Meech Lake Accord and current federal proposals, existing shared-cost and conditional grant programs also are unaffected; thus, conditional federal spending related to NRTs still could occur through the mechanism of the Canada Health Act. 256

#### Amendments to the Charter

The Canadian Charter of Rights and Freedoms was the most significant element of the 1982 constitutional reform package. Since its adoption, it has generated considerable litigation and numerous significant judicial decisions. Some commentators have suggested that the Charter undesirably constrains the legislative process and transfers too much power to an unelected judiciary. Others have suggested that the present Charter does not go far enough — that its provisions should not be subject to legislative override and that it lacks some fundamental guarantees. On the latter issue, the recent federal discussion paper recommended that the Charter be amended to include property rights, as well as recognition of Quebec as a distinct society within Canada. The federal discussion paper also proposed the insertion of a new "Canada clause" in the body of the Constitution Act, 1867. Finally, the Government of Ontario recently has circulated a discussion paper recommending the constitutional entrenchment of a social charter. The significance of these proposals for the regulation of NRTs is discussed below.

### Federal Proposals Relating to the Charter

During negotiations leading to adoption of the Constitution Act, 1982, the right to property was dropped from section 7 of the Charter. Shaping Canada's Future Together suggested that the Charter now should be amended to include a property rights guarantee. As discussed, the range of economic interests currently protected by section 7 appears limited. The Supreme Court of Canada also has held that corporations do not enjoy the rights contained in section 7 or 15. The specific inclusion of Charter property rights clearly would expand the scope of constitutional protection accorded to property and other economic interests. This would be particularly significant insofar as regulation of commercial interests involved in the research, development, and use of NRTs is concerned. For example, a decision to impose a public property regime in the area of NRT research might be subject to challenge if property rights were expressly

guaranteed under the Charter. If it could be shown that such research was a form of intellectual property falling within the general property rights guarantee, the federal government would be required to justify its regulatory intervention as meeting the section 7 requirements of

fundamental justice, and under section 1.

The entrenchment of a clause requiring that the Charter be interpreted in a manner consistent with the preservation and promotion of Quebec as a distinct society also could have an effect on the regulation of the research, development, and application of NRTs in Quebec. For example, the Quebec government's interest in promoting prenatal policies might justify certain legislative choices under section 1, including the decision to facilitate provincial access to NRTs notwithstanding their impact on other competing constitutional interests. If it could be demonstrated that parenthood or the family were particularly important social values in Quebec, this also might lead the courts to a more expansive reading of sections 7 and 15 in favour of parental rights, including the rights of those unwilling or unable to have children by conventional biological means.

While not strictly a Charter-related matter, the federal government also has recommended that a "Canada clause" be entrenched in section 2 of the Constitution Act, 1867, to affirm "the identity and aspirations for the people of Canada." Among these values and aspirations are (1) the equality of men and women; (2) the importance of tolerance for individuals, groups, and communities; (3) the principle of equality of opportunity throughout Canada; (4) a commitment to the well-being of all Canadians; and (5) a balance between personal and collective freedom and responsibility. While such a clause is intended primarily to have a symbolic or hortatory effect, it might, like the proposed "distinct society" clause, have some impact on the interpretation of the various Charter guarantees.

#### The Proposed Enactment of a Social Charter

The adoption of a social charter such as that proposed by the Ontario government also could have a significant impact on the regulation of NRTs. As described by the Ontario government discussion paper, A Canadian Social Charter: Making Our Shared Values Stronger, 269 a social charter would give constitutional expression to shared Canadian values, including the belief that governments have a positive role to play in providing health, education, and social welfare services; in promoting sexual and racial equality; and in reducing disparities in individual income opportunities. Such a charter would set out broad objectives for national social policy, as well as more precise norms and standards, such as portability and universality, which would be enforceable by the courts. 270 Among the options described by the Ontario discussion paper for constitutionalizing such objectives are (1) the entrenchment of a general declaratory clause setting out governmental commitments to certain social policy principles; (2) the expansion of section 36 of the Constitution Act, 1982 to identify the various social programs and services that governments

must provide; (3) the entrenchment of a governmental obligation to ensure that social programs embody specific norms and standards; and (4) an expanded interprovincial mobility rights guarantee under section 6 of the Charter.<sup>271</sup>

A constitutional affirmation of governmental obligations to ensure equal access to health and other social services and to reduce social and economic disparities will necessarily have implications for the regulation of NRTs. Such an affirmation, in concert with existing guarantees under sections 15 and 36, will reinforce arguments that government policy in this area must promote interpersonal and interregional equity and must help reduce disparities in opportunities related to gender, social class, and race. In particular, a social charter could reinforce individuals' ability to contest barriers to access to NRTs before the courts, while forcing governments to account for funding policies that result in disparities in the availability of basic health and social services across Canada.

#### Conclusion

The problem of ensuring that the future evolution of NRTs reflects the public interest has created new and complex challenges for Canadian governments. Among these challenges is the need to regulate NRTs in accordance with the terms of the Canadian Constitution.

The first part of this paper argues that NRTs are susceptible to extensive federal regulation, as a matter of national interest and concern, under the peace, order, and good government power, as well as under federal spending, criminal law, trade and commerce, taxing, and treaty powers. The paper also suggests that substantial provincial regulation in this area is permissible, pursuant to provincial powers over health, property, and civil rights, provided that provincial regulation does not conflict with federal law.

The second part of the paper suggests that a strong argument can be made that sections 7 and 15 of the Charter guarantee the right to become a parent, and that such a right extends to parenthood by means of NRTs. As a consequence, governmental restrictions on access to NRTs, including barriers based on social or economic condition, sexual orientation, family status, or other discriminatory grounds, may be impermissible, unless they can be justified under section 1 of the Charter. In light of the particular biological and social significance of reproduction for women, the paper contends that heightened attention must be paid to the rights and interests of women in formulating and implementing government policy in relation to NRTs.

The final section of the paper suggests that recent proposals for constitutional change, including proposed changes to the federal-provincial division of powers, and amendments to the Charter, may have significant

repercussions for the regulation of NRTs. In particular, the proposed enactment of a social charter, insofar as it entrenches rights in relation to health services, may reinforce individual NRT-related claims.

Given the recent origins of their research, development, and application, it is not surprising that most of the constitutional issues surrounding NRTs have yet to be decided by the courts. The foregoing discussion has attempted to outline the constitutional framework within which legislative, regulatory, and policy choices relating to NRTs must be made, and to shed some light on how these difficult questions may eventually be resolved.

## Appendix 1. The Provisions of the Constitution Acts

## THE CONSTITUTION ACT, 1867 30 & 31 Victoria, c. 3. (U.K.)

#### VI. Distribution of Legislative Powers Powers of the Parliament

- **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—
- 1. Repealed.
- 1A. The Public Debt and Property.
- 2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
- 3. The raising of Money by any Mode or System of Taxation.
- 4. The borrowing of Money on the Public Credit.
- 5. Postal Service.
- 6. The Census and Statistics.
- 7. Militia, Military and Naval Service, and Defence.

- 8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
- 9. Beacons, Buoys, Lighthouses, and Sable Island.
- 10. Navigation and Shipping.
- 11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
- 12. Sea Coast and Inland Fisheries.
- 13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
- 14. Currency and Coinage.
- 15. Banking, Incorporation of Banks, and the Issue of Paper Money.
- 16. Savings Banks.
- 17. Weights and Measures.
- 18. Bills of Exchange and Promissory Notes.
- 19. Interest.
- 20. Legal Tender.
- 21. Bankruptcy and Insolvency.
- 22. Patents of Invention and Discovery.
- 23. Copyrights.
- 24. Indians, and Lands reserved for the Indians.
- 25. Naturalization and Aliens.
- 26. Marriage and Divorce.
- 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
- 28. The Establishment, Maintenance, and Management of Penitentiaries.
- 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

### Exclusive Powers of Provincial Legislatures

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the

Classes of Subjects next hereinafter enumerated; that is to say,—

- 1. Repealed.
- 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
- 3. The borrowing of Money on the sole Credit of the Province.
- 4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
- 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
- 6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
- 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
- 8. Municipal Institutions in the Province.
- 9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
- 10. Local Works and Undertakings other than such as are of the following Classes:—
  - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
  - (b) Lines of Steam Ships between the Province and any British or Foreign Country:
  - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
- 11. The Incorporation of Companies with Provincial Objects.
- 12. The Solemnization of Marriage in the Province.

- 13. Property and Civil Rights in the Province.
- 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
- 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
- 16. Generally all Matters of a merely local or private Nature in the Province ...

#### Education

- **93.** In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—
  - (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
  - (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
  - (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
  - (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the

Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section ...

#### VIII. REVENUES; DEBTS; ASSETS; TAXATION

- 102. All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided ...
- **106.** Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

#### CONSTITUTION ACT, 1982

#### SCHEDULE B

#### CONSTITUTION ACT, 1982 PART I

#### CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

### Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

## Fundamental Freedoms

- 2. Everyone has the following fundamental freedoms:
  - (a) freedom of conscience and religion;
  - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
  - (c) freedom of peaceful assembly; and
  - (d) freedom of association ...

## Legal Rights

**7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice ...

# Equality Rights

- 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethic origin, colour, religion, sex, age or mental or physical disability ...

#### General

**25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
- **26.** The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
- **27.** This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
- **28.** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons ...

# Application of Charter

## 32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
- (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.
- **33.** (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or the legislature of a province may reenact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4) ...

## PART III

## **EQUALIZATION AND REGIONAL DISPARITIES**

- **36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
  - (a) promoting equal opportunities for the well-being of Canadians;
  - (b) furthering economic development to reduce disparity in opportunities; and
  - (c) providing essential public services of reasonable quality to all Canadians.
- (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation ...

## PART VII

#### **GENERAL**

**52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

# (2) The Constitution of Canada includes

- (a) The Canada Act 1982, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).
- (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

## **Notes**

- 1. Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 (formerly British North America Act, 1867). Relevant provisions of the Constitution Acts are set out in Appendix 1.
- 2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter].
- 3. The supremacy of the Constitution over all inconsistent federal and provincial legislation now is expressly set out in section 52(1) of the Constitution Act, 1982. Judicial review on grounds relating to the *Canadian Charter of Rights and Freedoms* also is provided for under section 24(1) of the Charter in the following terms:
  - 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Judicial review of legislation on division of powers grounds is a matter of long-standing practice; see B.L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 2d ed. (Toronto: Butterworths, 1983).

- 4. Papp v. Papp (1970), 8 D.L.R. (3d) 389 (Ont. C.A.).
- 5. Ibid. For a discussion of the double aspect doctrine and the principles of constitutional interpretation, see P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985).
- 6. R.S.C. 1985 (2d Supp.), c. 3.
- 7. Other examples include international relations and the environment.
- 8. It would appear from the Court's decision in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, that the third "gap" branch of the POGG power, which supported legislation dealing with subjects not recognized or fully dealt with when the Constitution was drafted, such as narcotic control in R. v. Hauser, [1979] 1 S.C.R. 984, has been subsumed into the national-concern branch of POGG, as described below.

- 9. The "national emergency" branch of the POGG power was relied upon most recently by the Court, in *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, to uphold the federal Anti-Inflation Act. As mentioned *infra*, discussion at note 20, the Court rejected the national-concern branch of the POGG clause as a basis of support for the act.
- 10. A. G. Ontario v. Canada Temperance Federation, [1946] A.C. 193. The "national-concern" doctrine was first put forward in A. G. Ontario v. A. G. Dominion, [1896] A.C. 348 at 361, by Lord Watson, who suggested that "[t]heir Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."
- 11. Supra, note 8.
- 12. S.C. 1974-75-76, c. 55.
- 13. Supra, note 8, at 432.
- 14. Ibid., at 432-34. In his dissenting opinion, at p. 452, Justice La Forest rejected the characterization of marine pollution as a matter falling within the national-concern branch of the POGG power and warned that "[b]y conceptualizing broad social, economic, and political issues [as single indivisible matters of national interest and concern lying outside the specific heads of power assigned under the Constitution], one can effectively invent new heads of federal power under the national dimensions doctrine, thereby incidentally removing them from provincial jurisdiction or at least abridging the provinces' freedom of operation."
- 15. As many commentators have pointed out, AI is not, properly speaking, an NRT, having been practised in North America for at least a century; see M.A. Coffey, "Of Father Born: A Lesbian Feminist Critique of the Ontario Law Reform Commission Recommendations on Artificial Insemination," Canadian Journal of Women and the Law 1 (1986), 424, note 2.
- 16. In Schnetder v. R., [1982] 2 S.C.R. 112, a decision recognizing the validity of the B.C. Heroin Treatment Act, S.B.C. 1978, c. 24, Justice Laskin emphasized, at p. 114, that Parliament is not precluded from "legislating in relation to public health, viewed as directed to the protection of the national welfare." In his judgment, Justice Estey suggested, at p. 141, that while the provinces have the power to legislate "where the approach in the legislation is to an aspect of health, local in nature," federal health legislation can be supported "where the dimension of the problem is national rather than local in nature"; see the discussion, *Infra*, note 98ff.
- 17. Supra, note 8, at 432.
- 18. As the Commission pointed out in *What We Heard: Issues and Questions Raised During the Public Hearings* (Ottawa: Royal Commission on New Reproductive Technologies, 1991), 15, "infertility" is a contested notion, and the traditionally stated objectives of research and development of NRTs are challenged by feminist researchers in particular; see, for example, C. Overall, "Reproductive Ethics: Feminist and Non-Feminist Approaches," *Canadian Journal of Women and the Law* 1 (1986), 273-74.
- 19. Supra, note 8.

- 20. Reference re Anti-Inflation Act, supra, note 9, at 458.
- 21. Ibid.
- 22. R. v. Crown Zellerbach, supra, note 8, at 453.
- 23. Reference re Anti-Inflation Act, supra, note 9, at 458.
- 24. Infra, note 113ff.
- 25. The determination of civil rights in the non-constitutional context is a matter for federal or provincial intervention according to which level of government has jurisdiction over the subject matter in question. Without judicial interpretation of the existing provisions of the Charter in favour of such rights, the gamete, embryo, and fetus can acquire constitutional status only through a formal process of constitutional amendment.
- 26. R.S.C. 1985, c. C-6. The purpose and effects of the Canada Health Act are described at length in S.L. Martin, Women's Reproductive Health, the Canadian Charter of Rights and Freedoms, and the Canada Health Act (Ottawa: Canadian Advisory Council on the Status of Women, 1989). See also D. Guest, The Emergence of Social Security in Canada, 2d ed. (Vancouver: University of British Columbia Press, 1985), 227-29.
- 27. R.S.C. 1985, c. C-1.
- 28. While the spending power has attracted little judicial attention, it has generated considerable scholarly comment; see, for example, E.A. Driedger, "The Spending Power," *Queen's Law Journal* 7 (1981-82): 124-34; F. Chevrette, "Contrôler le pouvoir fédéral de dépenser: un gain ou un piège?" in *L'adhésion du Québec à l'accord du Lac Meech*, ed. R.-A. Forest (Montreal: Themis, 1988), 153; K.G. Banting, "Federalism, Social Reform, and the Spending Power," *Canadian Public Policy* 14 (Suppl.) (1988): 81-92; A. Petter, "Federalism and the Myth of the Federal Spending Power," *Canadian Bar Review* 68 (1989): 448-79; and P. Barker, "Medicare, Meech Lake, and the Federal Spending Power," *Canadian Journal of Law and Society* 5 (1990): 111-26.
- 29. See, for example, P.M. Leslie, ed., "Quebec and the Constitutional Issue," in Canada: The State of the Federation 1986 (Kingston: Queen's University, Institute of Intergovernmental Relations, 1987), 78-79; J.E. Magnet, "The Constitutional Distribution of Taxation Powers in Canada," Ottawa Law Review 10 (1978), 483-84; and National Council of Welfare, Funding Health and Higher Education: Danger Looming (Ottawa: Minister of Supply and Services Canada, 1991), 5.
- 30. See, for example, Petter, supra, note 28, 455; and A. Lajoie, "L'impact des accords du Lac Meech sur le pouvoir de dépenser," in L'adhésion du Québec à l'accord du Lac Meech, ed. R.-A. Forest (Montreal: Themis, 1988), 163.
- 31. In the 1936 Reference Re Employment and Social Insurance Act, [1936] S.C.R. 427 at 457, Justice Kerwin held for a Court majority, that "Parliament, by properly framed legislation may raise money by taxation and dispose of its public property in any manner that it sees fit," including the making of conditional grants; however, he found that the legislation in question, providing for compulsory payment of UI premiums into an earmarked fund, for distribution by the federal government in the form of UI benefits, was not legitimate spending legislation. Rather, the act governed contracts of employment and insurance, which are matters of provincial jurisdiction over property and civil rights. The Privy Council confirmed the Court's

- decision in A. G. Canada v. A. G. Ontario (Reference Re Employment and Social Insurance Act), [1937] A.C. 355, prompting a 1940 constitutional amendment to transfer jurisdiction over UI to the federal government, under section 91(2A).
- 32. In YMHA Jewish Community Centre of Winnipeg v. Brown, [1989] 1 S.C.R. 1532, dealing with the applicability of provincial wage laws to workers under a federal job-creation program, Justice L'Heureux-Dubé suggested, at p. 1549, that Parliament is free to offer grants, including in the area of employment training, subject to whatever restrictions it sees fit; however, she emphasized that "the mere spending of federal money cannot bring a matter which is otherwise provincial into federal competence."
- 33. In the recent decision in *Reference Re Constitutional Question Act (B.C.)*, (1991) 127 N.R. 161 at 211-12, Justice Sopinka dismissed the argument that the Government Expenditures Restraint Act, S.C. 1991, c. 9, which limits the growth of federal contributions under the Canada Assistance Plan, amounts to impermissible regulation of matters outside federal jurisdiction, holding that the act "is simply an austerity measure," and that its impact upon provincial interests does not, without more, render it unconstitutional.
- 34. (1988), 53 D.L.R. (4th) 413; leave to appeal refused (1989), 95 A.R. 236 (note) (S.C.C.).
- 35. S.C. 1983-84, c. 6.
- 36. R.S.C. 1970, c. C-1.
- 37. R.S.C. 1985, c. F-8.
- 38. Winterhaven Stables Ltd., supra, note 34, at 433.
- 39. In *Dunbar v. A. G. Saskatchewan* (1984), 11 D.L.R. (4th) 374 (Sask. Q.B.), a case dealing with the constitutionality of provincial spending in the federal field of international aid, Justice Matheson suggested, at p. 377, with regard to conditional grants that
  - [I]t is almost impossible to envisage a grant, voluntarily accepted, imposing conditions which would be synonymous with regulation of the activity in which the recipient is involved, unless the activity was proscribed if the grant was not accepted.
- 40. Supra, note 34, 434. In Central Mortgage and Housing Corporation v. Cooperative College Residences (1975), 13 O.R. (2d) 394 at 410-11, the Ontario Court of Appeal came to a similar conclusion with respect to the National Housing Act, R.S.C. 1970, c. N-10, which it characterized as a proper exercise of the federal spending power, rather than as unconstitutional legislation in relation to provincial matters of housing or education.
- 41. Section 36(2), relating to equalization payments, provides as follows:
  - (2) Parliament and the Government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.
- 42. See M. Jackman, "The Protection of Welfare Rights Under the Charter," *Ottawa Law Review* 20 (1988), 299-305; R.W. Broadway, J.M. Mintz, and D.D. Purvis, "Economic Policy Implications of the Meech Lake Accord," in *Competing*

Constitutional Visions — The Meech Lake Accord, ed. K.E. Swinton and C.J. Rogerson (Toronto: Carswell, 1988), 228; and R. Broadway, "Federal-Provincial Fiscal Relations in the Wake of Deficit Reduction," in Canada: The State of the Federation — 1989, ed. R.L. Watts and D.M. Brown (Kingston: Queen's University, Institute of Intergovernmental Relations, 1989), 125-27.

- 43. Supra, note 26.
- 44. For a discussion of the Canada Health Act in the context of women's reproductive health, see Martin, supra, note 26.
- 45. Proprietary Articles Trade Association v. A.G. Canada, [1931] A.C. 310 at 324.
- 46. Reference Re Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1 at 49.
- 47. The general requirement that criminal law take the form of a prohibition coupled with a sanction is drawn from Lord Atkin's definition of criminal law in the *PATA* case, *supra*, note 45.
- 48. In Canadian Federation of Agriculture v. A. G. Quebec ("Margarine Reference"), [1951] A.C. 179, confirming the Court's decision in Reference Re Validity of Section 5(a) of the Dairy Industry Act, supra, note 46, the Privy Council struck down a criminal prohibition against the manufacture and sale of margarine on the basis that it is legislation aimed at protecting the dairy industry's economic interests rather than Canadians' health.
- 49. R. v. Swain (1991), 125 N.R. 1 at 65.
- 50. Morgentaler v. R., [1976] 1 S.C.R. 616 at 627.
- 51. R. v. Zelensky, [1978] 2 S.C.R. 940.
- 52. Supra, note 46, at 50.
- 53. R.S.C. 1970, c. H-3.
- 54. (1976), 73 D.L.R. (3d) 312 at 314.
- 55. [1983] 2 R.S.C. 284.
- 56. R.S.C. 1970, c. F-27.
- 57. [1980] 1 S.C.R. 914 at 934.
- 58. Supra, note 50, at 627.
- 59. R.S.C. 1970, c. C-34.
- 60. R. v. Morgentaler, [1988] 1 S.C.R. 30 at 128. In his concurring opinion, at p. 124, Justice Beetz argued that section 251 of the Criminal Code would be ultra vires the federal government if its sole or principal objective were the protection of pregnant women's health, since in his view this is a matter for provincial jurisdiction.
- 61. See the discussion, infra, note 119ff.
- 62. See the discussion in Part 2, infra.
- 63. See the discussion, supra, note 47.
- 64. Citizens Insurance Company of Canada v. Parsons (1881), 7 A.C. 96.
- 65. Supra, note 57.

- 66. Supra, note 56.
- 67. Supra, note 57, at 943.
- 68. Supra, note 55, at 288. Commentators have pointed out that the Court's acceptance of the detailed regulation of the pharmaceutical industry in R. v. Wetmore is difficult to reconcile with the outcome in Labatt Breweries of Canada, and passing comments by Justice Laskin may "presage a reconsideration of Labatts"; see J.D. Whyte, "Federal Powers over the Economy: Finding New Jurisdictional Room," Canadian Business Law Journal 13 (1987), 283; and N. Finkelstein, "Case Comment on A. G. Canada v. Canadian National Transportation Ltd.; R. v. Wetmore," Canadian Bar Review 62 (1982), 196.
- 69. [1989] 1 S.C.R. 641.
- 70. R.S.C. 1970, c. C-23.
- 71. Supra, note 69, at 661-62.
- 72. [1983] 2 S.C.R. 206 at 267.
- 73. Ibid.
- 74. Supra, note 71.
- 75. R.S.C. 1985, c. F-27. Contraception, pregnancy, and fertility-related drugs in Canada are evaluated and approved under the Food and Drugs Act and regulations. As discussed *supra*, note 65, while Justice Estey refused, in the *Labatt* case, to uphold the Food and Drugs Act provisions regulating light beer under the trade and commerce power, the act's validity under the trade and commerce power insofar as the regulation of pharmaceuticals is concerned was confirmed by Justice Laskin in *R. v. Wetmore*, *supra*, note 55.
- 76. R.S.C. 1985, c. C-34.
- 77. S.C. 1970-71-72, c. 63, as amended.
- 78. See, for example, D.M. Cameron and J.S. Dupré, "The Financial Framework of Income Distribution and Social Services," in *Canada and the New Constitution: The Unfinished Agenda*, Vol. I, ed. S.M. Beck and I. Bernier (Montreal: Institute for Research on Public Policy, 1983), 370-74.
- 79. Supra, note 9, at 390.
- 80. A. G. Canada v. A. G. Ontarto, supra, note 31. In his decision, Lord Atkin reasoned, at p. 366-67, as follows:

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations, or public authorities could not as a general proposition be denied ... But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence. It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*.

- 81. Supra, note 77.
- 82. Reference Re Regulation and Control of Radio Communication in Canada ("Radio Reference"), [1932] A.C. 304.

- 83. A. G. Canada v. A. G. Ontarto ("Labour Conventions Reference"), [1937] A.C. 326.
- 84. Ibid., at 351.
- 85. [1977] 2 S.C.R. 134.
- 86. Supra, note 16, at 135.
- 87. Canada's international human rights and treaty obligations also are relevant for the interpretation of the Charter. Generally, an international convention becomes a direct source of obligation in Canadian law only if it is implemented by domestic legislation; however, even in the absence of implementing legislation, the courts have held that the presumption against violation of Canada's international obligations justifies the use of international treaties as an aid to interpreting the Charter; see *Mitchell v. A. G. Ontario* (1984), 7 C.R.R. 153 at 166 (Ont. H.C.); and *R. v. Videoflicks Ltd.* (1984), 9 C.R.R. 193 (Ont. C.A.). For a discussion of the impact of international human rights law on the Charter, see M. Cohen and A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law," *Canadian Bar Review* 61 (1983): 265-313. For a discussion of international human rights law in the context of NRTs, see B.M. Knoppers, "Reproductive Technology and International Mechanisms of Protection of the Human Person," *McGtll Law Journal* 32 (1986-87): 336-58.
- 88. Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316, (1966).
- 89. Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316, (1966).
- 90. International Covenant on Economic, Social and Cultural Rights, supra, note 88, art. 15(1).
- 91. International Covenant on Civil and Political Rights, supra, note 89, art. 23(2); see also International Covenant on Economic, Social and Cultural Rights, supra, note 88, art. 10(1).
- 92. International Covenant on Civil and Political Rights, supra, note 89, art. 2.
- 93. As mentioned *supra*, note 25, civil rights of a non-constitutional nature can be created by the federal or provincial governments, depending on their subject matter. For a civil right to attain constitutional status, and therefore be protected from legislative interference, it must be formally entrenched in the Constitution, in accordance with the provisions of Part V of the Constitution Act, 1982.
- 94. See Citizens Insurance Company of Canada v. Parsons, supra, note 64.
- 95. See Toronto Electric Commissioners v. Snider, [1925] A.C. 396.
- 96. "Labour Conventions Reference," supra, note 83; and Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749 at 761. Under section 92(10), however, the federal government has exclusive legislative jurisdiction in relation to terms and conditions of employment in federal undertakings, which include interprovincial transportation, broadcast television and radio, railway, and telephone companies; see Bell Canada v. Quebec, ibid.
- 97. Re Adoption Act of Ontario, [1938] S.C.R. 398.

- 98. Schneider v. R., supra, note 16, at 136-37; and Bell Canada v. Quebec, supra, note 96, at 761.
- 99. Section 92(9) empowers the provinces to pass laws related to "shop, saloon, tavern, auctioneer, and other licensees to raise revenue for provincial, local, or municipal purposes."
- 100. See R.T. McKall, "Constitutional Jurisdiction over Public Health," *Manttoba Law Journal* 6 (1975): 317-26; and A. Lajoie and P.A. Molinari, "Partage constitutionnel des compétences en matière de santé au Canada," *Canadian Bar Review* 56 (1978): 579-602.
- 101. A. G. Canada v. A. G. Ontario (Reference Re Employment and Social Insurance Act), supra, note 31. In his majority decision, Justice Rinfret declared, at p. 451:

Insurance of all sorts, including insurance against unemployment and health insurance, have always been recognized as being exclusively provincial matters under the head "Property and Civil Rights" or under the head "Matters of a merely local or private nature in the Province."

- 102. Supra, note 16.
- 103. Ibid.
- 104. Ibid.
- 105. Ibid., at 142. In his decision in *Labatt Breweries of Canada Ltd. v. A. G. Canada, supra*, note 57, at 934, Justice Estey confirmed the existence of such a POGG-based federal health power, suggesting it provides support for the health-and safety-related provisions of the federal Food and Drugs Act.
- 106. Ibid., at 141.
- 107. Ibid., at 137.
- 108. (1986), 25 D.L.R. (4th) 751.
- 109. Ibid., at 753. In *B.C. Civil Liberties Association v. A. G. British Columbia* (1988), 49 D.L.R. (4th) 493, another challenge to provincial abortion legislation enacted after the Supreme Court's *Morgentaler* decision, the B.C. Supreme Court found that the provincial Cabinet lacks authority, under the provincial Medical Service Act, R.S.B.C. 1979, c. 255, to declare that non-therapeutic abortions are not medically required services, although it might have the power to declare that such abortions are not insured services under the province's health plan.
- 110. S.N.S. 1989, c. 9.
- 111. (1991), 83 D.L.R. (4th) 8 (N.S.C.A.).
- 112. (1983), 6 D.L.R. (4th) 57 at 64 (F.C.A.).
- 113. See the cases discussed supra, notes 108-12.
- 114. Provincial Secretary of P.E.I. v. Egan, [1941] S.C.R. 396; Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004.
- 115. [1982] 2 S.C.R. 161 at 191.
- 116. Bank of Montreal v. Hall, [1990] 1 S.C.R. 121 at 154.
- 117. [1989] 1 S.C.R. 927 at 964.
- 118. See, for example, Jackman, supra, note 42, 322-28.

- 119. Supra, note 60.
- 120. Ibid., at 167-71. The due-process clause of the Fourteenth Amendment of the United States Constitution provides, in relevant part, "no State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
- 121. 316 U.S. 535 (1942) at 541.
- 122. R. v. Morgentaler, supra, note 60, at 168.
- 123. 405 U.S. 438 (1972).
- 124. R. v. Morgentaler, supra, note 60, at 168.
- 125. The right to abortion as an aspect of the right to privacy was expressly recognized by the United States Supreme Court in *Roe v. Wade* 410 U.S. 113 (1973). While a majority of the Canadian Supreme Court concurred that the abortion provisions of the Criminal Code violate section 7, only Justice Wilson's decision was framed in terms of procreative rights *per se*.
- 126. Ibid. Like the majority, Justice Wilson refrained from dealing with the issue of fetal rights under section 7, but argued that, in the later stages of fetal development, the state may be able to justify limits on women's procreative autonomy under section 1; see the discussion, *infra*, note 219ff.
- 127. R. v. Morgentaler (1986), 22 D.L.R. (4th) 641 at 665.
- 128. [1986] 2 S.C.R. 388.
- 129. Ibid., at 434.
- 130. Ibid., at 419-20.
- 131. [1990] 1 S.C.R. 1123.
- 132. Ibid., at 1173.
- 133. Ibid.
- 134. Supra, note 60.
- 135. [1986] 2 S.C.R. 284.
- 136. Ibid., at 318.
- 137. Supra, note 60, at 171.
- 138. Supra, note 135, at 319.
- 139. An interpretation of section 7 recognizing procreative and parental rights also is consistent with Canada's international human rights obligations; see *supra*, note 87.
- 140. Supra, note 131.
- 141. Ibid., at 1173.
- 142. In the *Morgentaler* case, Justice Wilson held that the abortion provisions of the Criminal Code also violate the pregnant woman's freedom of conscience and religion; *supra*, note 60, at 175.
- 143. Supra, note 135, at 303. The arbitrariness of the criteria used to limit pregnant women's section 7 rights was a dominant factor in the majority's decision

that the abortion provisions of the Criminal Code did not accord with principles of fundamental justice, in *R. v. Morgentaler*, supra, note 60.

144. An argument that governments are required to provide participatory opportunities in policy making affecting reproductive rights also gains credence from these more expansive interpretations of the principles of fundamental justice; see the discussion in the section entitled "Access to the Policy-Making Process in the Field of New Reproductive Technologies," *infra*.

145. Section 15(2) provides that: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Pursuant to section 32(2), section 15 came into force on 17 April 1985, three years after the rest of the Charter. This period was intended to enable governments to bring their legislation into conformity with the Charter's anti-discrimination requirements.

146. [1990] 3 S.C.R. 229 at 276.

147. [1990] 2 S.C.R. 906.

148. Ibid., at 931.

149. [1989] 1 S.C.R. 1296 at 1333.

150. [1989] 1 S.C.R. 143 at 174.

151. Supra, note 149, at 1331.

152. Ibid., at 1333.

153. Ibid. The issue of the unconstitutionality of distinctions arising from interprovincial variations in the application of federal law, in this case the Young Offenders Act, also is considered by the Court in *R. v. Sheldon S.*, (1990) 110 N.R. 321. Justice Dickson rejected the proposition that interprovincial variations resulting from the application of provincial law could be challenged under section 15(1) and suggested, at 362, that determining whether province-based distinctions arising from the application of federal law contravene section 15 requires a case-by-case approach, but "differential application of federal law can be a legitimate means of forwarding the values of a federal system"; see the discussion, *infra*, note 191.

154. [1989] 1 S.C.R. 1219.

155. S.M. 1974, c. 65, s. 6(1).

156. Supra, note 154, at 1243-44.

157. Andrews v. Law Society of British Columbia, supra, note 150.

158. See infra, note 161ff.

159. R. v. Turpin, supra, note 149, at 1333.

160. Ibid.; Andrews v. Law Society of British Columbia, supra, note 150, at 152. The concept of "discrete and insular minorities" is drawn from American case law under the equal protection clause of the United States Bill of Rights. For a discussion of this concept, see, for example, J.H. Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge: Harvard University Press, 1980).

161. R. v. Oakes, [1986] 1 S.C.R. 103.

- 162. Supra, note 146, at 304-305.
  - 163. [1986] 2 S.C.R. 713.
  - 164. Ibid., at 795.
  - 165. Supra, note 131.
  - 166. Supra, note 60, at 71. Responding to the Crown's argument that women unable to obtain therapeutic abortions in their home communities need only travel elsewhere, Justice Dickson commented:

If women were ... simply confronting the reality that it is often difficult to obtain medical services in rural areas, it might be appropriate to say "let them travel." But the evidence establishes convincingly that it is the law itself which in many ways *prevents* access to local therapeutic abortion facilities. The enormous emotional and financial burden placed upon women who must travel long distances from home to obtain an abortion is a burden created in many instances by Parliament.

- 167. Ibid., at 164.
- 168. Supra, note 125, at 154.
- 169. 476 U.S. 747 (1986) at 773.
- 170, 432 U.S. 464 (1977).
- 171. 448 U.S. 297 (1980).
- 172. Ibid., at 317-18. The Court confirmed this view more recently in Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) at 3051, citing DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998 (1989), where Justice Rehnquist stated for the majority:

[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

- 173. See, for example, Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at 498; and R. v. Rahey, [1987] 1 S.C.R. 588 at 636-39.
- 174. [1985] 1 S.C.R. 295 at 344.
- 175. See Jackman, supra, note 42, 259-83.
- 176. See the discussion supra, note 42.
- 177. For example, the affirmative action guarantees under section 6(3) and section 15(2) and the minority language rights guarantees contained in sections 20 and 23.
- 178. As discussed in Part 3, a right to basic health care has been discussed as a possible element of a new "social" charter; see *infra*, note 269ff.
- 179. See the discussion in Part 1, supra.
- 180. Supra, note 146, at 304-305; see also: R. v. Edwards Books and Art Ltd., supra, note 163, at 795; Irwin Toy Ltd. v. Quebec, supra, note 117, at 993-94; and United States of America v. Cotroni (1989), 96 N.R. 321 at 339.
- 181. A reluctance to dictate public expenditure choices is clearly discernible in United States Supreme Court interpretation of the due-process clause; see, for

example, *Mathews v. Eldridge*, 424 U.S. 319 (1976); J.L. Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*," *University of Chicago Law Review* 44 (1976): 28-59; and G.E. Frug, "The Judicial Power of the Purse," *University of Pennsylvanta Law Review* 126 (1978): 715-94. For a discussion of the possible meaning of the principles of fundamental justice in the welfare and reproductive rights contexts in Canada, see Jackman, *supra*, note 42; and H. Lessard, "Relationship, Particularity and Change: Reflection on *R. v. Morgentaler* and Feminist Approaches to Liberty," *McGill Law Journal* 36 (1990): 263-307.

182. In contrast to Justice La Forest's suggestion, in the *McKinney* case, *supra*, note 146, that the courts will apply section 1 with a greater degree of circumspection where legislative choices involve the allocation of government resources, in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 218, Justice Wilson rejected the suggestion that "utilitarian" factors such as cost and administrative convenience are appropriate considerations under section 1.

183. See, for example, Andrews v. Law Society of British Columbia, supra, note 150, at 163-64; and McKinney v. University of Guelph, supra, note 146, at 276.

184. Supra, note 149.

185. For a discussion of existing and proposed criteria for access to NRTs in Canada, see B.M. Knoppers and E. Sloss, "Recent Developments: Legislative Reforms in Reproductive Technology," Ottawa Law Review 18 (1986): 663-719.

186. R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

187. Supra, note 146, at 269.

188. [1990] 3 S.C.R. 483. In the earlier case of Canadian Urban Equities Ltd. v. Direct Action for Life (1990), 70 D.L.R. (4th) 691, the Alberta Court of Queen's Bench also held that a hospital seeking an injunction to prevent anti-abortion protesters from picketing a reproductive clinic it operates is not a part of government or performing government functions for purposes of the Charter.

189. Ibid., at 505-17. In her dissenting opinion, at p. 533-44, Justice Wilson argued that, because the government exercises control over the hospital with respect to its governing structure, policies, and funding, including the funding of its patients, and because the establishment and maintenance of hospitals are a traditional function of government, the hospital's actions should be subject to the Charter.

190. [1990] 2 F.C. 129 (C.A.). The case involved a section 15 challenge to a provision of the Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, offering parental leave benefits to adoptive parents, but not to natural parents. At trial, [1988] 3 F.C. 515, the plaintiff succeeded in his claim that the act discriminated on the basis of parental status, a non-enumerated grounds under section 15. Referring to Justice Dickson's judgment in the *Brooks* case, *supra*, note 154, and to the B.C. Court of Appeal's decision in *Re Hoogbruin and Attorney-General of British Columbia* (1985), 24 D.L.R. (4th) 718, the Court agreed, at p. 145, that there was no difference in section 15 terms between a program that offered child care benefits to all parents, excepting natural parents, and a program that only offered benefits to adoptive parents, since natural parents were unequal in both cases.

- 191. Supra, note 153.
- 192. Ibid., at 362.
- 193. Supra, note 42.
- 194. Supra, note 183ff. In its decision in Symes v. Minister of National Revenue (1991), 127 N.R. 348 at 377, the Federal Court of Appeal stated in particular:

The Charter imposes on legislatures no obligation to redress all social or economic inequalities. Rather, in s. 15(2), it allows them to adopt "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups." It seems obvious that what legislators have a power to do they do not have a duty to do.

- 195. For example, evidence of disproportionate underuse of amniocentesis by women with limited education and women from lower socioeconomic backgrounds might raise section 15 concerns. See A. Lippman, "Access to Prenatal Screening Services: Who Decides?" Canadian Journal of Women and the Law 1 (1986), 440.
- 196. See R. Anand, "Ethnic Equality," in Equality Rights and the Canadian Charter of Rights and Freedoms, ed. A.F. Bayefsky and M. Eberts (Toronto: Carswell, 1985), 81.
- 197. Sexual orientation already has been recognized by some courts as a non-enumerated grounds of discrimination under section 15; see, for example, *Brown v. British Columbia (Minister of Health)* (1990), 19 A.C.W.S. (3d) 216 (B.C.S.C.); and *Veysey v. Commissioner of the Correctional Service of Canada* (1990), 109 N.R. 300 (F.C.A.). For a discussion of sexual orientation as a prohibited grounds of discrimination under the Charter, see A. Bruner, "Sexual Orientation and Equality Rights," in *Equality Rights and the Canadian Charter of Rights and Freedoms*, ed. A.F. Bayefsky and M. Eberts (Toronto: Carswell, 1985), 457.
- 198. For a discussion of section 15 as a barrier to discrimination on the basis of marital status, see A.A. McLellan, "Marital Status and Equality Rights," in *Equality Rights and the Canadian Charter of Rights and Freedoms*, ed. A.F. Bayefsky and M. Eberts (Toronto: Carswell, 1985), 411.
- 199. See, for example, Schachter v. Canada, supra, note 190; Re MacVicar and Superintendent of Family & Child Services (1986), 34 D.L.R. (4th) 488 (B.C.S.C.); Leroux v. Co-operators General Insurance Co. (1990), 65 D.L.R. (4th) 702 (Ont. H.C.J.); and Milne v. Alberta (A. G.) (1990), 26 R.F.L. (3d) 389 (Alta. Q.B.).
- 200. Supra, note 146, at 297.
- 201. For a discussion of these grounds of discrimination, see M.D. Lepofsky and J.E. Bickenbach, "Equality Rights and the Physically Handicapped," in Equality Rights and the Canadian Charter of Rights and Freedoms, ed. A.F. Bayefsky and M. Eberts (Toronto: Carswell, 1985), 323; and D. Vickers and O. Endicott, "Mental Disability and Equality Rights," in Equality Rights and the Canadian Charter of Rights and Freedoms, ed. A.F. Bayefsky and M. Eberts (Toronto: Carswell, 1985), 381.
- 202. For a discussion of existing and proposed legislative measures in relation to surrogate motherhood in Canada, see Knoppers and Sloss, *supra*, note 185.
- 203. See, for example, the recommendations with respect to surrogate motherhood in the Ontario Law Reform Commission's *Report on Human Artificial Reproduction*

and Related Matters, vol. 2 (Toronto: Ontario Ministry of the Attorney General, 1985), 239-42.

204. Ibid., 252.

205. Claims that the constitutional right to procreate includes the right to parenthood through surrogate motherhood, or precludes statutory restrictions in relation to surrogate motherhood, have been rejected by the U.S. courts; see *In the Matter of Baby "M,"* 537 A.2d 1227 (N.J. 1988); and *Doe v. Kelley*, 307 N.W. 2d 438 (1981). Commercial surrogate motherhood arrangements are statutorily prohibited in England; see Knoppers and Sloss, *supra*, note 185, 708.

206. Supra, note 186.

207. Section 8 provides that "everyone has the right to be secure against unreasonable search or seizure."

208. Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at 160; see also Thompson Newspapers v. Canada, [1990] 1 S.C.R. 425 at 461; Dion v. P. G. du Canada, [1986] R.J.Q. 2196 (Q.S.C.); and Re T. and Catholic Children's Aid Society of Metropolitan Toronto (1984), 46 O.R. (2d) 347 (Prov. Ct.).

209. R. v. Duarte, (1990) 53 C.C.C. (3d) 1 at 12.

210. [1988] 2 S.C.R. 417 at 429-30. On that basis, Justice La Forest found that section 8 of the Charter was violated when a doctor treating a patient after a traffic accident gave a vial of blood, collected for medical purposes without the patient's knowledge or consent, to a police officer. Justice La Forest concluded that this act amounted to a seizure infringing the patient's spatial, personal, and informational spheres of privacy and was unjustified, absent compelling circumstances of pressing necessity; ibid., at 436.

211. Supra, note 60.

212. See Canada (A. G.) v. Central Cartage Co., [1990] 2 F.C. 641, leave to appeal refused, [1991] 1 S.C.R. vii, with respect to the non-applicability of section 15 to corporations; and Dywidag Systems International, Canada Ltd. v. Zutphen Brother Construction Ltd., [1990] 1 S.C.R. 705 at 709, with respect to the non-applicability of section 7, except where a corporation attempts to defend itself against a criminal charge by arguing that the law under which the charge is brought is unconstitutional.

213. See, for example, Justice Lamer's opinion in the "Prostitution Reference," supra, note 131; the Federal Court of Appeal's decision in Symes v. Minister of National Revenue, supra, note 194; and M.D. Lepofsky, "Case Comment on Wilson v. B.C. Medical Services Commission," Canadian Bar Review 68 (1989), 621.

214. See, for example, Ford v. Quebec (A. G.), [1988] 2 S.C.R. 712; and Irwin Toy Ltd. v. Quebec (A. G.), supra, note 117.

215. See, for example, the decision in Irwin Toy Ltd. v. Quebec (A. G.), ibid.

216. For a discussion of existing and proposed Canadian regulatory intervention in this area, see Knoppers and Sloss, *supra*, note 185.

217. (1988), 53 D.L.R. (4th) 171 at 190; (sub. nom. Medical Services Commission of B.C. v. Wilson) leave to appeal refused, [1988] 2 S.C.R. viii.

218. (1986), 22 D.L.R. (4th) 303.

- 219. Any pre-birth claims, such as claims for tortious injury, against the fetus are contingent upon its subsequent live birth; see *Montreal Tramways Co. v. Leveille*, [1933] S.C.R. 456; and *Dehler v. Ottawa Civic Hospital* (1979), 25 O.R. (2d) 748 (Ont. H.C.), aff'd (1980), 29 O.R. (2d) 677 (Ont. C.A.), leave to appeal refused, [1981] 1 S.C.R. viii.
- 220. Supra, note 119ff.
- 221. [1989] 1 S.C.R. 342.
- 222. [1989] 2 S.C.R. 530.
- 223. Borowski v. A. G. Canada (1987), 39 D.L.R. (4th) 731 (Sask. C.A.). The Ontario High Court came to a similar conclusion in Campbell v. A. G. Ontario (1987), 58 O.R. (2d) 209; affd (1987), 60 O.R. (2d) 617 (C.A.), leave to appeal refused, [1987] 1 S.C.R. vi.
- 224. Supra, note 222, at 561.
- 225. Ibid., at 570.
- 226. Ibid., at 555.
- 227. Ibid., at 567-68. In the subsequent case of R.v.Sulltvan, [1991] 1 S.C.R. 489, the Court also held that the fetus is not a person for purposes of the Criminal Code.
- 228. Ibid., at 572.
- 229. Ibid., at 554.
- 230. In the *Morgentaler* case, for example, Justice Wilson held that, by imposing a certain moral view of abortion premised on when human life begins, the abortion provision of the Criminal Code violates the right to freedom of conscience under section 2(a) of the Charter, *supra*, note 60.
- 231. In its decision in *Roe v. Wade*, the United States Supreme Court held that the notion of person as used in the Fourteenth Amendment of the United States Constitution does not include the unborn; *supra*, note 125, at 158.
- 232. See R. v. Morgentaler, supra, note 60. See also Collin v. Lusster, [1983] 1 F.C. 218 at 239 (T.D.).
- 233. See Jones v. R., supra, note 135, at 319.
- 234. Supra, note 207ff. For a discussion of this issue, see B.M. Knoppers, "Vérité et information de la personne," Revue générale de droit 18 (1987): 819-42; and Knoppers and Sloss, supra, note 185.
- 235. See, for example, Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311. For a discussion of the concepts of fairness and natural justice as they relate to the Charter, see P. Garant and R. Dussault, "L'équité procédurale et la révolution tranquille du droit administratif," Revue de droit de l'Université de Sherbrooke 16 (1986): 495-540; and D. Mullan, "Natural Justice The Challenges of Nicholson, Deference Theory, and the Charter," in Recent Developments in Administrative Law, ed. N.R. Finkelstein and B. MacLeod Rogers (Toronto: Carswell, 1987), 1ff.
- 236. T.M. Scanlon, "Due Process," in *Due Process*, ed. J.R. Pennock and J.W. Chapman, Nomos 18 (New York: New York University Press, 1977), 94. See also J. Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities," *Yale Journal of Law and Feminism* 1 (1989): 7-36.

- 237. P. Nonet, Administrative Justice: Advocacy and Change in a Government Agency (New York: Russell Sage Foundation, 1969), 7.
- 238. See, for example, M. Jackman, "Rights and Participation: The Use of the Charter to Supervise the Regulatory Process," Canadian Journal of Administrative Law & Practice 4 (1990): 23-56; Lessard, supra, note 181; and L.E. Trakman, Reasoning with the Charter (Toronto: Butterworths, 1991).
- 239. See, for example, Andrews v. Law Society of British Columbia, supra, note 150, at 182-83; R. v. Turpin, supra, note 149, at 1331-32.
- 240. See P. Monahan, Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada (Toronto: Carswell, 1987), 127-32.
- 241. For a discussion of the significance of NRTs for women, see L.S. Williams, But What Will They Mean for Women? Feminist Concerns About the New Reproductive Technologies (Ottawa: Canadian Research Institute for the Advancement of Women, 1986); L. Dunnigan and L. Barnard, Nouvelles technologies de la reproduction: analyse et questionnements féministes (Quebec: Conseil du statut de la femme, 1986); B.M. Knoppers, "Women and Reproductive Technologies," in Family Law in Canada: New Directions, ed. D. Sloss (Ottawa: Canadian Advisory Council on the Status of Women, 1985), 211ff; and articles collected in the "Women and Reproduction" issue of the Canadian Journal of Women and the Law (1986, Vol. 1, No. 2).
- 242. As mentioned, section 28 applies notwithstanding any other Charter provision.
- 243. Supra, note 154.
- 244. Justice Wilson described how difficult it is for men to appreciate the complex decisions faced by women in the reproductive context, *supra*, note 160, at 171, as follows:
  - It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.
- 245. Canada, Constitutional Amendment 1987 (Ottawa: Queen's Printer, 1987).
- 246. Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons, *Constitution of Canada: Final Report* (Ottawa: Queen's Printer, 1972), 98. The Molgat-MacGuigan report suggested that the POGG power should be retained as "an expression of the overriding Federal legislative power over matters of a national nature" (Recommendation 52), but that since the federal general power is counterbalanced by the provincial power over matters of a provincial or local nature, "there is no place for a purely residuary power" (Recommendation 53).
- 247. Canada, Shaping Canada's Future Together: Proposals (Ottawa: Minister of Supply and Services Canada, 1991), 36.
- 248. See the discussion at supra, note 8ff.
- 249. See the discussion, supra, note 26ff.
- 250. Supra, note 246, Recommendations 56-58.

251. Supra, note 245. Section 106A (2) states that "nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces."

252. Canada, Shaping Canada's Future Together, supra, note 247, 40.

253. Ibid., 40-41.

254. Ibid.

255. Quebec, Commission on the Political and Constitutional Future of Quebec, *Report* (Quebec: The Commission, 1991) (Co-chairs: M. Bélanger & J. Campeau), 48.

256. See supra, note 26.

257. See, for example, H.J. Glasbeek and M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms," Socialist Studies 2 (1984): 84-124; R.I. Cheffins and P.A. Johnson, The Revised Canadian Constitution: Politics as Law (Toronto: McGraw-Hill Ryerson, 1986); A.C. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter," University of Toronto Law Journal 38 (1988): 278-97; and M. Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall & Thompson, 1989).

258. Section 33 of the Charter, or the "notwithstanding clause," enables the Parliament and the provincial legislatures to override the guarantees contained in section 2 and sections 7-15 of the Charter. In *Shaping Canada's Future Together*, the federal government recommends that a vote of 60 percent of the members of the Parliament or of a provincial legislature be required to invoke section 33; *supra*, note 247, at 4.

259. For example, environmental rights; see D. Gibson, "Constitutional Entrenchment of Environmental Rights," in *Le droit à la qualité de l'environnement:* un droit en devenir, un droit à définir, ed. N. Duplé (Montreal: Québec/Amérique, 1987), 274; property rights, see "Discussion: Property Rights and Liberty," Canadian Journal of Law & Jurisprudence 1 (1988): 217-35; welfare rights, see R.E. Robertson, "The Right to Food: Canada's Broken Covenant," Canadian Human Rights Yearbook 6 (1989-90): 185-216; and Parkdale Community Legal Services, "Homelessness and the Right to Shelter: A View from Parkdale," Journal of Law and Social Policy 4 (1988): 33-101.

260. Supra, note 247, 3.

261. Ibid., 5-6.

262. Ibid., 9-10.

263. Ontario, Ministry of Intergovernmental Affairs, A Canadian Social Charter — Making Our Shared Values Stronger: A Discussion Paper (Toronto: The Ministry, 1991).

264. For a discussion of this process, see A. Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms," Canadian Journal of Political Science 14 (1991): 309-29.

265. See the discussion, supra, note 212ff.

266. For a discussion of this issue, see J. McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights," Alberta Law

Review 26 (1988): 548-83; and C.F. Beckton, "The Impact on Women of Entrenchment of Property Rights in the Canadian Charter of Rights and Freedoms," Dalhouste Law Journal 9 (1984-85): 288-312.

- 267. Supra, note 247, 9.
- 268. Ibid., 7-9.
- 269. Ontario, A Canadian Social Charter, supra, note 263, 1-3.
- 270. Ibid., 16.
- 271. Ibid., 17-18.

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# An Overview of the Legal System in Canada

Sheilah L. Martin



## **Executive Summary**

A royal commission is actively engaged in the process of law reform and the creation of legal principles. Thus, it not only becomes part of the legal system, it may also simultaneously shape, alter, and partially redefine what that system is. This paper examines the legal system and how it works and provides an analytical framework to help deal with the two questions facing the Royal Commission on New Reproductive Technologies: whether legal intervention is warranted and what form such intervention should take.

The first part of the paper analyzes the social context of law, pointing out that law shapes and is shaped by its social environment. Existing law should not be accepted uncritically as achieving a just, acceptable, and appropriate balancing of interests; to be responsible and responsive, law makers must consider the perspectives of different constituencies, particularly women, people of colour, the disabled, and the poor, all of whom may suffer a disproportionately negative impact unless their concerns are addressed specifically. The paper proposes that women's perspectives on new reproductive technologies (NRTs) be included at a fundamental level of analysis. Such an approach would be consistent with the requirement of the Commission's mandate to

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evaluate the impact of reproductive technologies on women, would respect women's constitutionally entrenched rights and freedoms, and would emphasize that the position of women must be considered when judging the implications of reproductive technologies. The remainder of the first part outlines the functions and sources of law and the various actors involved in the legal system.

The second half of the paper develops an analytical framework for making decisions about the legal status of NRTs. The steps in this framework are the following: defining the problem; ascertaining whether there is currently a law that applies to the problem; deciding on the goals and objectives of proposed intervention, as law is but one way to effect a chosen policy; assessing whether any law is needed, or whether there might be a better way to effect the policy; analyzing constraints and influences on the choice of law, including the constitutional division of powers, the Charter, the legal framework for the health care system (Canada Health Act), and Canada's international obligations; choosing the appropriate type of law, including criminal prohibition, regulatory powers, licensing schemes, delegated decision making, private law mechanisms, and alternative forms of legal control; and considering the administration and enforcement of laws.

The author concludes that, at this initial stage in the legislative history of NRTs, the Commission can do no more than recommend firstgeneration laws with the primary purpose of increasing public and political awareness of the potential problems associated with NRTs. Public attitudes will continue to remain in a state of flux and be formed and revised as more information is received. The Commission's lawmaking task is to establish the groundwork, lay the foundation, and craft the pillars of principle that will support our emerging understanding of, and growing needs for, NRTs.

# Introduction

The complex, multi-faceted legal system has the potential to influence the Commission's deliberations in significant ways. The purpose of this paper is to provide an overview of the legal system, which may help Commissioners guide the development of reproductive technologies in Canada. There are many reasons why an understanding of the legal system is essential to the formulation of sound policy recommendations. Most obviously, the legal system will be implicated if the Commission recommends any form of legal reform. In addition, the legal system is a social framework that influences human behaviour; it helps explain why society works the way it does. The legal system reflects underlying social, political, and economic values and conveys how we attempt to reconcile competing claims and conflicting rights. On a more practical level, the existing legal system limits the available range of policy options because of the division of powers between the federal and provincial governments. At

the core of the Canadian legal system is the *Canadian Charter of Rights and Freedoms*, which outlines protected rights and freedoms, establishes the parameters for state action, suggests desirable social outcomes, and provides the legal context in which all recommendations, even non-legal ones, should be evaluated. Given the reach of law's empire, it is unlikely that contact with the legal system can be avoided.

This paper is presented in two parts. The first part examines important information about the legal system and how it functions. including the social context of law, the functions of law, and the sources of law. The philosophical foundations of law, which underlie much of this discussion, are treated separately in Appendix 2. A review of legal actors is also provided. These actors include the government and legislative bodies, those to whom legislative authority or discretionary decision making has been delegated, the courts, law reform commissions, law societies, lawrelated interest groups, and persons charged with the administration and enforcement of laws. The combination of a post-modern society, new technologies, changing public perceptions, and an essentially evolutionary legal system will raise special concerns for the Commission. Commissioners are reminded that they need not merely accept the legal system as they find it. A royal commission is actively engaged in the process of law reform and the creation of legal principles. As such, not only does it become part of the legal system, it may simultaneously shape, alter, and partially redefine what that system is. This Commission, therefore, has the opportunity and perhaps the obligation, given the nature of the subject matter and the terms of its mandate, to go beyond current legal concepts, when needed, to tailor recommendations to the modern world of reproductive technologies and entrenched rights and freedoms.

The second part of the paper provides an analytical framework to help determine whether legal intervention is warranted and to help select the best form of legal control in a particular case. The proposed methodology promotes a principled and systematic way of thinking about law and the legal system and encourages Commissioners to ask the right questions, consider relevant alternatives, and articulate their reasoning. The model is intended to be general and generic so it can be used to analyze the diverse issues within the Commission's mandate. While all examples concern reproductive technologies, this paper will not and cannot completely examine, comprehensively analyze, or exhaustively debate the merits or demerits of legislative options on particular topics like preconception agreements, artificial insemination, or *in vitro* fertilization (IVF).

The analytical framework is organized around certain pivotal questions. The initial sequence relates to defining the problem, assessing and appreciating whether there is currently a law on the subject, and outlining the goals and objectives of proposed intervention. Only after decision makers have a sense of the nature and extent of the problem, gauged the efficacy of the current response, and agreed upon a common characterization of the goals to be achieved and the evil to be remedied can

they address whether legal intervention is warranted. The question of whether any law on a given subject is needed requires consideration of non-law alternatives and the law's proper province.

If legal intervention is selected, the type of law that is appropriate, given the nature and extent of the identified problem, must be determined. Decision makers should consider how existing features of the Canadian legal system may constrain, shape, or limit the range of available options. Commissioners should be principally concerned with the division of legislative authority between the federal and provincial governments and the obligation on all state actors to respect the rights and freedoms guaranteed in the *Canadian Charter of Rights and Freedoms*. Other matters, such as the current legislative basis for the cost-sharing program underlying health care in the Canada Health Act and Canada's international law commitments as they relate to reproductive technologies, deserve to be mentioned here but will be addressed by others in separate papers.

Within these constraints, those charged with the responsibility of examining and recommending public policy have numerous legal options open to them. Different forms of legal control are often better suited to certain types of problems. The following forms will be examined and explained: criminal prohibitions, regulatory standards, licensing, delegated decision making, private law implications, and alternative forms of regulation. The final question in the decision-making framework will concern the projected effectiveness of certain forms of law. Answering this question requires a consideration of the legal and social conditions in which a law can best be expected to fulfil its intended purpose.

# Law and the Legal System

Law is the body of oral or written rules and conventions that seeks to regulate human behaviour. It is prescriptive and technical and is said to be both fact and value, because by describing what "ought" to occur, law hopes to shape what does occur. But law is also part of a larger legal process and social context. This section, which provides the information necessary to decide whether legal intervention is appropriate, develops an overview of the social context of law, the functions of law, the sources of law, and the principal actors within the legal system.

## The Social Context of Law

Law may "[appear] as an arcane world of professionalism centred on a body of esoteric knowledge which is intimidating to the uninitiated in its bulk and obscurity." Often, there is a sense that law can and should be isolated from its social, political, and historical contexts, and that legal methodology and legal rules are so distinctive they can be separated from other aspects of life. Some authors suggest that law can be understood and

evaluated in terms of its own internal categories, without reference to the society in which it develops.<sup>2</sup> This view is more a hope born of a professional ethos than a result of empirical evidence. While law should be recognized as its own discipline, one need only look to the changing scope and character of legal regulation, and the relationship between legal developments and wider social change, to establish the importance of the social context of law. Positing the insularity of law is best seen as an increasingly discredited part of legal mythology. Increasingly, the focus is on law in society and law in action.

Modern jurists suggest that a fuller appreciation of the role of law can be gained only if law is approached as a socially situated process.<sup>3</sup> Law is a process because it is in a state of flux. Law is socially situated because it emerges from social relations and contributes to their preservation and transformation. There is, therefore, a complex relationship between law and the society it purports to regulate. Law shapes and is shaped by its social environment. Law is implicated in and reflective of larger social problems: sometimes called the "reactive" dimension of law. For example, in circumstances of social inequality, not all groups will have had the same access to law to entrench their preferences into legal positions. 4 Therefore, existing law should not be accepted uncritically as achieving a just, acceptable, and appropriate balancing of interests. Careful scrutiny must be given to the social, political, and historical contexts in which past laws were enacted to prevent their hidden values from being improperly carried forward to define current legal rights. In the current context of the Commission, deciding whether new laws are needed requires an appreciation that social inequality may also mean that not all relevant perspectives will be either sufficiently or equally represented by formal briefs or as part of "public" opinion. Establishing inclusive procedures and recognizing that various groups may have different levels of access to, and influence over, decision makers may partially mitigate how any structural social imbalances affect the law-making process.

When law is viewed in its social context, it becomes more of a mode of organization and decision making than a set of rules and principles. Law becomes only part of the social order, and not necessarily the most important part, in controlling human behaviour. In other words, law may help to structure the nature and relations of a society. This structuring might be considered "the constitutive dimension of law." Understanding the social context of law suggests not only that law should yield to social purpose, but that it should be justified in relation to its responsiveness to social needs, claims, and interests.

The social context in which law and the Commission currently exist has been described as "the postmodern condition." While law as a discipline has yet to come to terms with post-modernism, recognizing the components of post-modernism may help the Commission better understand the nature of some of the questions posed by new reproductive technologies. Stated simply, the two primary components of post-modernism

are technology and difference. Post-modern thinkers claim that we are currently experiencing a technological revolution that is likely to introduce social, philosophical, economic, and structural changes greater than those triggered by the industrial revolution. The issues surrounding new reproductive technologies are part of this larger and rather unpredictable dynamic. The prospect of radical and far-reaching changes means that any analysis or proposal that is unduly tied to current social arrangements may be structurally incapable of responding to whatever societal needs develop.

The second dimension of post-modernism, "difference," has cultural rather than technological origins. Historically, Western thought has not only assumed a unified human person as the basic unit of society, it has also assumed that all persons are the same. However, with the emergence of gender, race, and class consciousness and the formation of new social movements, it has been argued that this assumed person is not universal but is instead limited, partial, and based on the model of a privileged white male. Post-modernism rejects this model and calls for the recognition and celebration of difference. The ramifications of this component of the postmodern perspective (i.e., difference) are profound, even disturbing particularly if the Commissioners propose legal reforms. Traditionally, one of the main justifications and foundations for legal regulation is the belief that society, as a whole, consents to the law. Diversity replaces similarity as a defining characteristic of a post-modern order, with the result that law makers can no longer assume sameness; any agreed-upon justification for law is substantially weakened, if it is available at all. To be responsible and responsive, law makers must consider the perspectives of different constituencies — in particular, the perspectives of women, people of colour, the disabled, and the poor. Not only are they part of the community, but they may suffer a disproportionately negative impact unless their concerns are addressed specifically. This challenges all law makers to create new modes of democratic participation, develop new processes, and manifest a greater sensitivity toward the needs and views of others.9

The social context of law on new reproductive technologies is especially problematic because it illustrates how the two components of post-modernism are not necessarily compatible, and might even be contradictory. The cultural component of post-modernism celebrates the plurality of people and sees the newly emergent order as an opportunity to enhance the freedom of all people. In this sense, cultural difference is optimistic. The technological dimension of post-modernism recognizes that technology may be out of control, unaccountable, and potentially destructive to humanity. In this sense, post-modernism is pessimistic. New reproductive technologies are one point at which these two components of post-modernism come into particularly sharp contrast, increasing the tension and the social importance of the choices made. Stated in another way: will the choices reinforce freedom and equality or will they facilitate a surrender to the technological imperative?

#### The Functions of Law

In light of the social context of law, the primary purposes of law are to order and regulate the affairs of all people, and to act as a standard of conduct and morality. While different social theories explain the function of law differently, most recognize that law seeks to control behaviour, punish law breakers, resolve conflict, formally express the dominant values of society, educate the public, and promote a broad range of social objectives. 11

In their most familiar forms, laws either establish minimum standards of conduct, by prescribing penalties, or generate affirmative responsibilities, by conferring powers or creating rights. But laws do more than police impropriety or restrain real, suspected, or expected misadventure. Laws can embody a common moral position or represent a statement of collective aspirations. For example, the rights and language in the Charter do not truthfully describe what we currently are, but they suggest what we ought to be. By doing so, they articulate key organizing values in Canadian society. Laws also provide a framework for analysis and serve an ideological function: they help construct and shape the world they are intended to regulate. Laws arbitrate conflict, but they may also contain conflict. They represent an ordering of interests and the choice of certain interests over others, and they contain latent standards and encoded preferences.

Laws can be used to pursue various objectives because the legal order has many dimensions. Some types of law are closely associated with particular functions. Individuals seeking to invoke the law as a method of control should appreciate which of the law's functions is appropriate. Abstract principles are important to how laws are conceived and used; there is an interplay between social policy and legal theory. Basic perspectives inform detailed prescriptions and shape how public purposes are defined and practical alternatives are perceived.

## The Sources of Law

There is a hierarchy among various sources of laws, based on their function, importance, and the formalities required to change them. While there are other sources of laws and legal authority, the most relevant include constitutional instruments, statutes, delegated legislation, discretionary decision-making powers, and judicial precedents.

The most important source of law in any society is its constitutional documents. Canada is no exception. On its own terms, the Constitution Act, 1982 is the "supreme law of Canada"; it governs how all other laws are made and provides a complex set of norms for constitutional amendment.<sup>15</sup> Two key aspects of Canada's constitutional arrangement are the division of legislative powers between Parliament and provincial legislatures in the Constitution Act, 1867 and the entrenchment of the Canadian Charter of Rights and Freedoms in the Constitution Act, 1982.

Using the authority conferred under the Constitution Act, 1867, legislative bodies enact statutes. Defined as "the written will of a sovereign legislative body," 16 statutes are an increasingly prevalent, if underexamined, source of law. Statutes are generally known as primary, governing, or enabling legislation because they are passed by the legislative body itself. Statutes, generally, can be repealed or amended in the same manner as they are enacted. As long as legislators are acting within their jurisdiction, and within the Charter, the type and scope of statutory control are virtually unlimited. Many of the legal controls Commissioners have been asked to consider in response to reproductive technologies would involve statutes. For example, the type of legal controls studied in the next section — criminal prohibitions, regulatory controls, licensing schemes, delegated decision making, and changes to certain private law concepts on family law, tort law, and contract law — may all take statutory form.

Legislatures can use statutes to delegate law-making power or decision-making authority to someone else. An enabling statute authorizes an inferior body to make statutory instruments in accordance with terms of reference it establishes. What results is often called subordinate or delegated legislation and it includes things like orders in council, regulations, by-laws, ordinances, statutory instruments, and rules and regulations. Law-making powers can be conferred on a wide range of persons or entities: the Cabinet, a minister of the Crown, an administrative tribunal, an independent administrative agency, a municipal council, or some other form of inferior legislative authority. Exercises of various forms of delegated decision making may be seen as law.

Another major source of law is case law: the decisions of courts in adjudicating particular matters. In common law systems, the role of the court is either to interpret statutes or to apply common law principles. The common law is not written down in any one place, as is a statute or subordinate legislation. Before judges can apply the law they must first cull it from a line of cases. The reasons for the decision of a given case may serve as a precedent for courts to follow in subsequent cases involving similar facts. The court system is a hierarchical structure whereby lower courts are bound to follow precedent cases that have been adjudicated in a higher court. This is known as the doctrine of *stare decisis*, the body of case law that develops acts to be used as a guide for judges in deciding future cases. As new fact situations arise, and as judges decide new cases, the existing principles are broadened, exceptions are developed, and the body of case law is expanded.

In contrast, Quebec's civil law system does not follow the doctrine of stare decisis. The Quebec Civil Code codifies essential legal principles in an accessible written format. Disputes are decided on the basis of the interpretation and application of articles in the Civil Code. While civil law judges are not technically bound by precedent, they do strive for some consistency and certainty in the law. Despite different principles, sources, and methodologies, civil law and common law share at least one thing:

both must be "constantly revised to adapt to the consequences of technological progress."  $^{18}$ 

## The Legal System and Its Actors

A study of the legal system requires more than an understanding of the definition, function, social context, and sources of law. Although the law plays a pivotal role in the legal system, it is but one aspect of a larger. more diverse whole. Laws exist within a structure of legal institutions with many actors involved in the development and delivery of the legal system. Key institutions include legislative bodies, those to whom legislative authority has been delegated or discretionary decision making has been vested, the courts, law reform commissions, law societies, law foundations, bar associations, law-related interest groups, and those charged with the administration and enforcement of laws. Legal actors help create, apply. enforce, critique, and oppose the law. It is important to recognize that legal institutions and legal actors operate within a larger social, economic, and political climate, and that they are embedded in the same social matrix as law. The legal system is a social institution that is also in a state of flux, if sometimes at a slower pace than is desired. The legal process involves how decisions are made, who makes them, what the decisions are, how they influence subsequent events, and how alternative decisions may have led to different results.

An understanding of how various legal institutions operate, and the personal and social characteristics of legal actors and legal institutions, provides valuable information when the Commission considers who is in the best position to make certain types of decisions. For example, there may be matters that do not lend themselves well to the judicial model of dispute resolution. An adversarial contest between two interested parties, which typifies private litigation, may not be the best forum in which to address complex, multidisciplinary problems that require subject matter expertise and political savvy on societal values and levels of tolerance. Commissioners should, therefore, have a rudimentary understanding of legal institutions to see the capacities and weaknesses of various institutions and to be in a position to assess their potential for realizing values.

#### **Governments**

Governments are central legal actors for many reasons. First, legislatures and Parliament have direct and primary law-making powers. In our elected representative democracy, all citizens have the right to vote and to run for office. Elected members are politically responsible for their decisions, to the extent that a dissatisfied electorate may vote them out of office at the next election. Compared with the judiciary, legislative bodies can effect radical change in the law in a relatively short time. Second, the government also includes an executive, which not only sets policy matters for the rest of the legislators, but whose ministers receive increasingly wide

grants of delegated authority. Ministers also supervise the government departments that implement and monitor policy. Third, the government contains the civil service, which operationalizes policy. Fourth, the government establishes and appoints various councils, commissions, boards, and tribunals with law-related functions.

#### Courts

The provincial and federal governments also have the power to establish courts and to appoint the judiciary. The Governor General (acting for the Queen) appoints judges of the superior, district, and county courts in each province; Parliament sets their salaries. 19 Parliament is also authorized to create federal courts "for the better Administration of the Laws of Canada"20 and has used this power to create the Federal Court of Canada, the Federal Court of Appeal, and the Supreme Court of Canada. The Supreme Court of Canada is governed in part by statute; three of the nine justices must be from Quebec. In 1949, appeals to the English Privy Council were abolished, making the Supreme Court of Canada the final appellate court. Provincial governments have the power to make laws regarding the administration of justice in the province, including the constitution, maintenance, and organization of civil and criminal provincial courts, and the rules of civil procedure. 21 Provinces appoint and pay the salaries of provincial court judges.

Courts determine if a government is acting unlawfully or outside its powers. Unless the government can invoke the "notwithstanding" clause, the judiciary has the final word.<sup>22</sup> In theory, the role of the courts is to apply, interpret, and enforce the law, whatever its source. In fact, this recognized role involves judges in a law-making process.<sup>23</sup> The federal government's jurisdiction to appoint superior court judges, therefore, gives it a significant, if indirect, power to influence the creation of law. The government appoints the appellate judges who hear and determine issues of law and thus selects the judges who are capable of modifying existing law or creating new law. The province's power to designate inferior court judges is not quite as wide-ranging because trial courts are concerned more with issues of fact than with the development of legal principle.

There are many critiques of the court as a law-making forum, and many concerns over the role, responsibilities, and social responsiveness of judges. All courts seek to resolve conflict, and criminal courts attempt to establish a forum for the dramatic reaffirmation of transgressed social values. The court process involves a decision between the interests of two parties in an adversarial environment with a winner and a loser. Rarely are other perspectives represented. The court process is adjudicative, authoritative, adversarial, visible, mandatory, and presided over by a judicial officer applying legal norms. <sup>24</sup> Judges are concerned with deciding the case before them, and not with making general policy or rendering decisions that allow the law to respond to evolving social conditions. The primary goal of courts is to resolve a particular controversy, not formulate general policy.

Under the common law system of *stare decisis*, if similar facts arise again within the same province, the judge of a lower court must follow the precedent set by the higher court judge. Judge-made law thus tends toward incremental change. Although a departure from precedent is possible, the judicial tone tends to be the more cautious one of adaptation and revision. In contrast, Parliament or a provincial legislature can make substantial changes more quickly and more easily than judges because judges are limited by the facts of the particular case and are bound by either the articles in the Quebec Civil Code or common law precedents. Judge-made laws can vary from province to province, unless there is a Supreme Court of Canada decision, which binds all Canadian courts. In addition to this lack of consistency, litigation is extremely expensive and time-consuming. Therefore, the interests of the powerful and economically advantaged are disproportionately addressed in court.

The ad hoc nature of judicial decision making also means that different judges may resolve the same problem in different ways, according to their own tenets and pursuant to their personal philosophy of life and law. This is especially problematic because appointments to the judiciary are often partisan and most judges are males from the same socioeconomic and cultural background. As of April 1, 1990, only 8.8 percent of all superior court judges in Canada were women.<sup>25</sup> Few judges come from visible minorities or Aboriginal groups, and even fewer have a disability. The extent to which the judiciary is not representative of the people in Canada creates general concerns. It also raises particular issues for something like new reproductive technologies where certain groups, such as women and people with disabilities, have particular and important interests, while others, such as Aboriginal peoples, may have different values or priorities.26 The National Overview prepared by the Royal Commission indicates that the representatives from the alternative health. women, legal and human rights, and medical sectors all expressed the view that women must be actively involved in the decision-making process on reproductive technologies, especially regarding the research conducted and the services provided. It is difficult to imagine how judge-made law will ensure that women's voices are heard and their interests protected. There are also claims that unelected judges should not be making laws, not only because of their selectivity, but because of their lack of political accountability.27

In addition, legal actors include the many forms of boards, commissions, tribunals, and agencies that perform essentially adjudicative functions, although they are not courts in the strict sense of the term. For example, human rights commissions investigate complaints, conduct hearings, resolve disputes, and monitor employment equity programs.<sup>28</sup>

Law Reform Commissions

The roster of relevant legal actors goes beyond the governments that make laws and the courts that apply and adapt them. Also included are organizations with a law-related function or focus. There are bodies that monitor and analyze the cohesiveness and comprehensiveness of current legal principles. Usually known as law reform commissions, these bodies have a shared institutional purpose of reviewing existing law and recommending necessary reforms. Some commissions are specifically charged with developing new approaches to law, approaches that respond to the changing needs of individuals and society.<sup>29</sup> Law reform commissions conduct legal research on all aspects of statute law, common law, judicial decisions, and delegated decision making. Law reform commissions are established by statute. The Law Reform Commission of Canada<sup>30</sup> used to deal with matters within federal jurisdiction; British Columbia, <sup>31</sup> Manitoba, <sup>32</sup> Newfoundland, <sup>33</sup> Saskatchewan, <sup>34</sup> Nova Scotia, <sup>35</sup> and Ontario <sup>36</sup> have law reform commissions established and governed by provincial acts. With the exception of Nova Scotia, the Lieutenant Governor in Council is authorized to appoint all commissioners and pay their remuneration.<sup>37</sup>

Other provinces use different formats to accomplish the critiquing and recommending function of law reform commissions. Alberta has an Institute of Law Research and Reform;<sup>38</sup> in New Brunswick there is a Law Reform Branch of the Department of the Attorney General; and in Prince Edward Island, where the Law Reform Commission is no longer active, the Department of Justice and the Attorney General play a minimal role in law reform. The Yukon does not have an independent law reform commission; it used to use the Law Reform Commission of Canada. In the Northwest Territories, the Law Reform Commission of the Department of Justice has not been active since 1989. In Quebec, there is a project studying revisions to the Civil Code and the Code of Civil Procedure.

The law reform commissions of Ontario, <sup>39</sup> Saskatchewan, <sup>40</sup> and British Columbia <sup>41</sup> have published reports and articles regarding new reproductive technologies. In 1988, the Quebec Task Force on New Reproductive Technologies published a summary of their report. The British Columbia Law Reform Commission considered a project on the legal aspects of human reproduction, but did not proceed with it. In Manitoba, the Law Reform Commission has done preliminary research in new reproductive technologies, but deferred its work when the Royal Commission was appointed. The Department of Justice and Attorney General of Prince Edward Island have struck a committee to consider new reproductive technologies.

## Lawyers and Law Societies

Lawyers are also legal actors. Not only do they manage individual cases and formulate the legal arguments presented to judges, they may play a larger role within the legal system in terms of their membership in law-related organizations. The legal profession is self-regulating; each

province and territory has a statute that establishes a law society to act as the body that regulates the practice of law.<sup>42</sup> Lawyering is a closed-shop profession and all practising barristers and solicitors must be members of the society. In theory, the primary duty of each law society is to protect the public interest in the administration of justice. The affairs of the society are managed by benchers, an executive or a council empowered to invest or borrow money, purchase assets, appoint committees, regulate the conduct of members, discipline members, make rules regarding admission to the bar, and establish an assurance or compensation fund to protect clients. Some law societies are allowed to use their funds for research on the law or to advance legal education. 43 Usually, it is the law foundation in each province that is empowered to receive money and to establish and maintain a fund for purposes including legal research, legal education, and law reform. 44 Law foundations are typically established in the same act that governs law societies. In the normal process, law societies and law foundations grant money upon acceptance of submissions requesting funding for particular projects. It does not appear that any such funds are being directed to the legal issues raised by reproductive technologies. 45

#### **Bar Associations**

Unlike law societies, which are established primarily to protect the interests of the public, bar associations exist primarily to meet the needs and interests of the legal profession. Branches of the Canadian Bar Association exist across the country, with most branches having many sections, such as family law, environmental law, labour law, and health law. Fees required to join a particular section can be used to fund educational events, guest speakers, research, and other activities. If a large-scale project, such as major research, is envisioned, the particular section often seeks the financial assistance of its law foundation. In 1989, the British Columbia branch of the Canadian Bar Association produced a paper on reproductive technology.<sup>46</sup>

# Law-Related Interest Groups

There are also other law-related groups, such as the National Association of Women and the Law and its provincial affiliates and the Women's Legal Education and Action Fund, which are actively involved in social and legal issues. In addition, interest groups can be considered to be legal actors when they attempt to influence the content, enforcement, and application of laws. Sometimes, the primary purpose of an organization is to press for legal reform. For other organizations, any dealings with the legal system are sporadic and confined to legal initiatives that affect their constituency.<sup>47</sup>

## Those Charged with the Administration and Enforcement of Laws

Individuals or agencies responsible for the administration and enforcement of laws play a significant role within the legal system. In many cases,

important decisions are at the discretion of public officials or agencies, whose choices may have a profound effect on the impact of a given law.<sup>48</sup>

## The Commission as Legal Actor

The task of formulating recommendations on new reproductive technologies, some of which may involve the legal system, presents Commissioners with special challenges and unique opportunities. The revolutionary potential of certain new reproductive technologies may strain an essentially evolutionary legal system. It has often been noted that law rarely keeps pace with medical advancements or scientific changes. One judge has commented that the place of law is marching to the rear of medicine and limping a little.<sup>49</sup>

This relationship between law and medicine does not, however, mean that law must be stagnant or unresponsive. Commissioners should not allow existing legal principles to improperly confine, direct, or limit their analysis. Sometimes existing models are used to generate what qualifies as the issue — for example, much of the debate concerning the confidentiality of the identity of gamete donors is generated by a legal system that ties parental obligations to genetic links. Even when the issue is identified. the initial reaction of legal actors, even legislators or reformers, may be to canvass whether an established rule can be extended to the new situation: an attempt to assimilate any new situation within existing legal principle and to discover which available paradigm most completely captures the new problem. The attempt to place emerging phenomena into current categories is not always appropriate. Deciding among existing legal principles involves selecting the most correct answer from somewhat flawed responses, but, like a multiple choice question, in certain cases the only accurate response is "none of the above." When the new situation falls outside the rationale of existing rules, the issue is whether the rule can be modified or should be discarded.

Commissioners can do more than update the particular legal rules and principles rendered obsolete by new technologies and shifting public attitudes. By the terms of its mandate, the Commission is a part of the legal system — a legal actor with an important chance to shape the law and legal system. The opportunity exists to create new legal categories by replacing the inadequate, unresponsive, or unrepresentative categories. Commissioners may choose to incorporate previously excluded perspectives into the legal system and accept different approaches to problems. For example, women's perspectives on new reproductive technologies could be included at a fundamental level of the analysis. This may encourage new ways of thinking about law and women. Current legal formulations often exclude or undervalue women's testimony and experience and are often based on a man's view of the world. If women's interests are fully considered when formulating legal norms, a new category of law around women's specific experiences, such as pregnancy and birthing, may

emerge.<sup>53</sup> This type of gender-inclusive reconceptualization, where laws consider the life experience and needs of both women and men, would be consistent with the part of the Commission's mandate that requires it to evaluate the impact of reproductive technologies on women. It would also respect women's constitutionally entrenched rights and freedoms and would respond to the strong and recurring theme in the public presentations that the position of women must be considered when judging the implications of reproductive technologies.<sup>54</sup> The Commission need not, therefore, merely use existing law and accept the legal system as it finds it — as a legal actor, the Commission may develop the legal system and introduce new directions, new models, and new forms of responsibility.

# **A Decision-Making Framework**

It may be disconcerting for those charged with guiding the direction and development of reproductive technologies in Canada to learn that there are few formal rules or generally accepted standards to help determine whether legal intervention should take place, or to help outline its most appropriate form. The legal system itself has not generated norms on legislative intervention except on such matters as which level of government has the power to act and what type of state action infringes the Canadian Charter of Rights and Freedoms. In most cases, it takes little more than political will and proper form for a new law to be created. There are limited studies in the sociological and legal literature that focus on the impact and effectiveness of particular regulatory initiatives, but there is no comprehensive treatment of law or no detailed treatment of matters that raise the same social, political, and legal concerns as reproductive technologies. In addition, there is no incontrovertible proof that there is a cause-andeffect relationship between the intended goal of a law and its actual consequences.55

Asking whether state intervention is warranted will uncover any philosophical differences Commissioners have on law, freedom, equality, and social control. There will be disagreement on when the state has the legitimate authority to intervene in the lives of its citizens, influence the development of scientific knowledge, and enter into the marketplace. These matters infuse all aspects of the inquiry and require a wider perspective than the legal system provides. The problem of competing philosophies is compounded by the dearth of definitive information on key subjects. For example, it is impossible to predict the effects of allowing unlimited sex selection on the numbers of future male and female children, or to outline the concrete consequences or ideological implications of the commodification of life. What is clear, however, is that accepting any form of state control will depend more on philosophical premises, reasoned conjecture,

and rational argument than on formal prerequisites, overarching legal

rules, or quantifiable data.56

Policy makers will be required to formulate their own justifications for invoking a law-making power, whether they do so by intention, by implication, or by default. There are many reasons why the threshold issue of the propriety of state intervention should be openly debated, fully articulated, and adequately explained. When introducing legal changes that directly affect people's lives, decision makers are expected to justify their choices. The legitimacy of what some see as an essentially subjective determination may depend on how well the decision makers have outlined the factors that led them to their conclusion. The acceptance of law and the development of effective social rules are best built upon a shared understanding, reasonably negotiated compromises, or persuasive arguments.

It is especially important that the reasons for legal intervention be open for public scrutiny when introducing new law on novel subjects, such as reproductive technologies. In this case, there is no customary basis for the legal intervention and, therefore, little residual public support to fall back on. In addition, the public representations made to the Commission illustrate the diverse opinions that currently exist. Express, overt reasoning is needed to explain a position, to rally support for it, and to convince those whose position did not carry the day that their arguments were heard and respected, even if ultimately rejected. When unanimity is impossible, the best alternative is to ensure that differing viewpoints have been stated candidly and vigorously considered. An open and principled approach may also help those individuals who have not yet reached their own conclusions on reproductive technologies. In addition, such an approach is also important from a policy perspective, allowing an assessment of whether the proposed law has achieved its intended purpose. It is interesting to note that a recurring criticism of the Warnock Report in England was its failure to provide a coherent articulation of the values and principles underlying its recommendations. 57

Articulating the reasons for state intervention also serves some important law-related functions. First, it may form the basis for classifying the pith and substance of legislation: a judgment about the essential goal of state action, which determines which level of government has the requisite jurisdiction to undertake it. Second, if the resultant state action infringes a recognized Charter right, the judiciary may use its wide remedies, unless the government establishes that its purpose is so pressing, substantial, and carefully tailored that it should be allowed to override a constitutionally protected interest. Third, a statement of purpose, especially if found in the preamble or opening part of a statute, can be used to construe the enactment; when judges apply the law, they look for the mischief the legislation is intended to remedy and try to construe individual sections in a consistent manner.

Under any decision-making framework, Commissioners would be required to seek their own views on fundamental philosophical issues self-consciously and openly register what factors, considerations, and arguments led them to their conclusions. It is equally important that matters as complex and significant as reproductive technologies be studied in a systematic manner. The following framework may provide a way to start thinking about whether any legal intervention is warranted and what form it should take:

- Defining the Problem
- Is There Currently a Law?
- The Goals and Objectives of Proposed Intervention
- Is Any Law Needed? Are There Alternatives to Law?
- Constraints and Influences on the Choice of Law
- Forms of Legal Regulation: Choosing a Type of Law
- The Administration and Enforcement of Laws

Each of these steps raises particular issues that will be addressed in a separate section.

## **Defining the Problem**

Within the legal community there is an adage that the person who frames the issue decides: a recognition of how important the initial characterization of the problem is to its analysis and resolution. In defining the problem, policy makers are required to reach consensus on the characterization, scope, and situs of the problem to be addressed. Each part of defining the problem requires a choice between alternatives with farreaching implications. Many groups appearing before the Commission presented arguments on their own terms, in the hope that their formulation of the issues would be accepted and acted upon. It is easy to appreciate that individuals who believe that the nature of the problem is systemic infertility would propose a very different set of recommendations for IVF than those who think the problem is a failure to disclose truthfully the procedure's risks and success rates. Competing characterizations can take place at many levels of analysis and may be conveyed in choices of words. For example, there is some question whether artificial insemination should be seen as a medical procedure. If a woman seeking artificial insemination is referred to as a "patient" there may be an implied acceptance of the propriety of the procedure's medicalization.58

When the decision-making framework is the legal system, there may be a tendency to present the "problem" in a legal manner. Sociologists suggest that some lawyers and legal reformers exaggerate the centrality of legal rules and forget all parts of the comment that "law is the totality of life, but seen from a specific viewpoint." The result may be the formulation of a problem in such a way that it could be more easily

remedied by a law-based response, without addressing underlying social tensions or causes. To pursue the IVF example, it is easier to enact legislation requiring practitioners to disclose the risks of IVF than to use law to help prevent the sexually transmitted diseases that account for a significant portion of infertility. The law and the legal system have the potential to improperly funnel issues, frame debates, and define the nature of the problems, even on non-law matters. <sup>60</sup>

The scope of the perceived problem must also be defined, because even if the nature of the problem is agreed upon, a problem can be expected to exist, in greater or lesser degrees, in a variety of mixes and with varying effects. In many cases, the key question is not whether a problem does or does not exist, but the more socially situated inquiry of how, and under what conditions, the perceived evil will be present. There are definite drawbacks to defining the scope of the problem either too narrowly or too widely. Trying to find *the* singular problem may involve a search for what has been called "false linearity." Neat, simple, and compartmentalized definitions may not consider a complex social context and its multiple lines of causality and consequence. <sup>62</sup>

Overly broad definitions can also detract from the formulation of appropriate responses. For example, when Commissioners address research on embryos, must they tackle the entire area of so-called "fetal rights" and present a coherent and comprehensive mega-theory? Or is it sufficient to seek a workable solution to the particular question of how the law should treat an embryo in relation to reproductive technologies — as the Warnock Commission did in England? Improperly wide definitions may also lead to state intervention that overshoots the mark. This risk is especially important in relation to new reproductive technologies because the technologies under study have a variety of clinical and eugenic applications. For example, if the concern is that prenatal diagnosis will be used for what some would consider an improper purpose, does that mean the practice itself should be controlled?

The situs of the defined problem must be found, and one must also question from whose perspective the problem is being defined. Asking whose problem it is is often a more sensitive determination than it may initially appear — especially if blaming the victim is to be avoided. The focus should be on the veritable source of the problem because certain people may experience the consequences of the problem, even though they have played no part in generating it. In some cases, the Commission may conclude that there is no actual problem, even though the public may perceive that there is a threat. In many instances, the proper response to real but unfounded fear is education, not legislation; over the course of history many law makers have discovered that unfounded moral panic is a poor prop for legislative initiatives.

# Is There Currently a Law?

Given the complex web of legal regulation that currently exists in Canada, there are very few subjects, including reproductive technologies, that are not subject to some form of legal control. References to a legal vacuum are somewhat misleading; perhaps the notion of "law's empire" makes the point better. The primary problems of reproductive technologies are that there is little direct and issue-specific regulation, and that existing laws are not comprehensive, complete, or coherent. In many cases, it is difficult to clearly state which, if any, legal principles apply and in what manner. The unresolved issues are significant, numerous, and troubling. The uncertainty they generate may slow down the advancement of the technologies, deter some people from participating in what may appear to be a legally questionable practice, and contribute to the public perception that no laws govern or guide a given subject.

It is part of the Commission's task to sort through the confusion and to determine whether current legal controls are capable of responding to the identified problem. In each case this will require a subject-specific analysis of the particular topic, but some general trends can be identified. Sometimes the problem is determining whether existing laws apply to emerging practices. For example, are people who perform artificial insemination practising medicine? Are semen and eggs subject to laws that deal with the donation of human tissue? In other cases, it is hard to tell how established legal principles apply in a new context. How does family law resolve a competition between the woman who donated an egg, the man who donated sperm, the woman who carried the fetus, and the couple who claims the baby under a preconception agreement? Can family law resolve this competition? For example, most family law principles simply assume that the genetic and social parents will be the same people. When new reproductive technologies allow this assumed unity to be divided, it can cause minor revisions in established principles or it can question the whole notion of a genetic axis to legally recognized parental responsibilities. If a new test is created, should it apply in all cases, even when the identity exists, or only in those cases that no longer conform to the scientific and social basis on which the legal rule was based? Sometimes the dilemma is presented as one of choosing between legal principles and competing characterizations. The debate over whether the legal status of the human embryo should be resolved according to personhood or property principles raises the more fundamental question of whether a competing characterization is even required in the first place. 63 If the primary concern is how embryos should be treated, then characterization under existing legal norms should be secondary to achieving the desired level of protection. 64 Lining up the parallels with existing ownership or custody models may not advance the argument, especially if the social context in which experimentation occurs is left unexplored.65

The failure to suggest reform may operate as a tacit selection of any existing legal rule, the political choices it represents, and its assessment of the best-placed decision maker. For example, in the absence of express statutory regulation, the legal status of preconception contracts will be determined by judges under the contract law rule that agreements against public policy will not be enforced, and the family law principle that disputes over custody will be resolved according to the best interests of the child.

## The Goals and Objectives of Proposed Intervention

After the nature, scope, and situs of a problem have been defined and current legal controls are understood, decision makers should consider policy goals and what objectives should be pursued. The selection of public policy objectives is key regardless of whether existing law is seen as sufficient or whether new legal controls are seen as necessary. Important decisions must be made on how certain behaviours and activities should be treated and which function of law should be invoked. Again, the setting of policy requires not only the articulation of values, but perhaps a choice among them. In setting the purpose behind a particular initiative, there may be an overlap with ethical principles such as respect for persons, well-being, and equality. Or the goal could be safety — all forms of legal control on a technology like artificial insemination should focus on genetic and medical screening and record keeping rather than obligations of donors and unconsenting husbands.

The Commission has a wide mandate and a broad range of policy choices. In this context, law is best seen as one way to effect a chosen policy — meaning that the existence and structure of any legal control are secondary considerations to the goal or objective sought. An understanding of available legal options may, however, give more scope to the range of policy alternatives and place them within their legal context.

## Is Any Law Needed? Are There Alternatives to Law?

The question "Is any law needed?" focusses on whether law is the only or best way to achieve the articulated goal and raises the spectrum of non-law options. Initially, it may appear somewhat artificial to separate the question of whether any type of law is needed from the related inquiry of what form that law either could or should take. There is an obvious relationship between choosing the form of law and deciding whether or not any law would be appropriate. Sometimes the answer to the question of whether intervention is warranted is conditioned on how the intervention is structured. Decision makers are often inclined to accept a legal response only because they believe that they have found the type of law that would adequately and appropriately address the perceived problem. This stage of the inquiry, however, is meant to focus attention on whether non-law alternatives exist and on how to determine whether they can achieve the decision maker's articulated goals and objectives. One can agree with the

statement that public concern should be reflected in public policy without concluding that a legal response is the best one available. For example, in many briefs there is an inchoate sense that reproductive technologies have brought with them unchecked power and unbridled science. But the call for standards need not be interpreted as an invitation to enact law or as a request for a particular type of law. What is often sought is some form of control, some public presence, some safeguard or supervision to ensure the integrity and personal responsibility of apparently unaccountable decision makers.

Determining the proper province of law requires a philosophical debate over the use and usefulness of law. In 1986 the Law Reform Commission of Canada reported that there were over 90 000 federal laws in Canada. This number reinforces that there are few restrictions or threshold requirements for intervention on the part of our law makers. In recent years a proliferation of legal regulation has accompanied an increasing public perception that law does not always work and should not always be seen as the answer. In addition, academic criticisms of law have emerged from almost every imaginable perspective. While there are those who are concerned that any law gives renewed legitimacy to the power of law to regulate and organize our lives, a significant dilemma for policy makers remains: they are caught between the notion that there are already too many laws and the implications that if so much is currently regulated, what would it say about the importance we attach to new reproductive technologies, public health, and women's safety if these interests do not merit legal intervention?

In ascertaining the proper province of law it may be helpful to distinguish law from morality and ethics because reproductive technologies raise many types of issues and force us to question our relationship to life, law, and each other. In criminal law there is the familiar debate about whether, and to what extent, law can be used to enforce morality. This debate assumes the separation of the world into private and public spheres of activities, a concept that is one of the more lasting and powerful legacies of the liberal legal tradition. According to these principles, state intervention into the private sphere is illegitimate unless the absence of some form of collective control will result in harm to others. Even among people who accept this premise, there is a lot of debate on what qualifies as harm.

Where science, technology, and medicine are considered the recognized interface is generally between law and ethics. The assigned task of ethics is to search for desirable goals and to establish the normative limits of right conduct. Law tends to be the regulation of human activity and conduct toward desirable social goals and may be seen as an instrument in social engineering. Policy is concerned with the choice of goals; the purpose of law is to translate these goals, by rules of conduct, into operative social fact, recognizing that law is not the only social vehicle for doing so.

Often, private ordering — allowing people to decide for themselves — may be seen as a better response if individual freedom is selected as the key value, or where the enforcement difficulties are so significant that it appears best not even to try. This choice is easier to justify in cases where there are recognized Charter interests. There is, however, the fear that private ordering may diminish certain interests; here, what is needed are restrictions based on publicly decided legal standards. Some claim that private ordering merely allows any general societal inequities to be reinforced in individual relationships. There may be other ways to control the behaviour because other models of social regulation may be better for certain types of problems.

There are also many limits on law that may influence whether the use of law is appropriate. It is important to remember that laws cannot control conduct in any absolute sense. There is a behavioural assumption that law influences human action, but even the most severe legal sanctions for murder do not stop killings. Law may also force "underground" certain types of behaviour without eradicating them entirely. In some cases, that may be all that is desired or possible, but sometimes this displacement

generates further problems or exacerbates existing ones.

There are other significant limits to law. First, it is difficult to predict the exact effect of any law or policy; some laws may not have their desired effect. There are no scientific data outlining the responsiveness of certain types of laws to certain forms of policy initiatives or legislative aspirations. resulting in the tendency to proceed on the basis of unproved assumptions and on an assessment of contingent consequences. Second, not only is there the recognized gap between enactment, implementation, and enforcement, but there is the unpredictability of the reception of a single provision into a diverse Canada. On issues such as human reproduction, different cultural and religious affiliations may have a significant impact on attitudes toward approved methods of childbearing. Third, a legal package cannot be expected to resolve ongoing social, ethical, and political debates. although it may limit and shape them. Law may not have support if there is no social consensus on the issue and there is still a contest between undetermined rights. Sometimes the recommendation of a law may even intensify public discussion because it gives groups and individuals a focus for their concerns and a platform for their politics.

## Constraints and Influences on the Choice of Law

Certain features of the existing legal system in Canada constrain and influence the range of recommendations open to the Commission. The two primary constraints are the legislative division of power and the obligation of all state actors to respect the entrenched rights in the *Canadian Charter of Rights and Freedoms* in the Constitution Act, 1982. In addition, Commissioners should understand the legal framework for the health care system and Canada's international obligations.

#### The Legislative Division of Power

The Constitution divides up legislative authority over all subjects between the federal and provincial governments. Although the wording of the act suggests that one level of government is given exclusive jurisdiction over particular subjects, in some areas overlapping jurisdictions have evolved and are judicially recognized. It is quite common that different aspects of a subject will fall within different jurisdictions, especially given the obvious breadth of some of the powers. Federal legislation will be paramount only in cases where federal and provincial legislation clash or are functionally incompatible. In addition, if there is no federal legislation occupying the field, the provinces then possess greater legislative latitude.

The many sources and forms of legal control available to the federal and provincial or territorial governments give them wide powers either to promote or to hinder reproductive technologies. Their decisions will influence how reproductive technologies are conceptualized and administered. The federal government's jurisdiction over certain aspects of reproductive technologies is based on its interest in national health and welfare, its criminal law power, and its spending power. The quest for national standards found in many briefs submitted to the Commission may reflect the public's lack of understanding concerning the legislative division of powers between the federal and provincial governments. In this context, federal powers are rather circumscribed. Federal influence, through its spending power, is also waning as a result of its own policies.

Both levels of government may legislate the health aspects of reproductive technologies because "health" is "not a single matter assigned ... exclusively to one level of government." Health has been called an "amorphous topic" that can be addressed by valid federal or provincial and territorial legislation, depending on the circumstances and scope of the health problem at issue. Parliament's jurisdiction over health matters of national dimension is supported by its power to legislate for the peace, order, and good government of Canada. Even though the national aspect of this power has been given a fairly narrow reading, certain health matters of national concern, such as some of the regulatory health aspects of reproductive technologies, may be within federal control. Parliament relies on these powers and its criminal law power to support the Food and Drugs Act, under which the federal government evaluates and approves any drug or device available in Canada.

The federal government also has the power to define crime and to determine punishment. The criminal law power is invoked to sanction the type of conduct so detrimental to society's social and moral fabric that criminal prohibitions and penalties are warranted. Provinces may create quasi-criminal and regulatory offences, but offences that concern public peace, order, security, health, or morality are within the exclusive federal sphere of criminal law. The federal government may also rely upon its spending power to forge a national health care policy indirectly. The federal spending power is not enumerated as a separate head of power in the

Constitution Act, 1867, but its source is Parliament's ability to levy taxes, regulate public property, and appropriate federal funds. The federal government can spend money on matters outside its legislative jurisdiction such as some aspects of health care. One example is the federal-provincial cost-sharing program at the base of our current system of publicly funded health care services. To

The scope of provincial and territorial powers means they can influence access to reproductive technologies in many ways. The Constitution Act, 1867 gives each province the jurisdiction to regulate local matters of public health, within its boundaries. Provinces and territories control property and civil rights within the province or territory and have express authority over the establishment, maintenance, and management of hospitals. 76 Provinces and territories also have regulatory power over the many non-criminal aspects of reproductive technologies, and they control who may practise what form of medicine within their jurisdiction. Provinces also determine which services are deemed to be medically necessary under the federal-provincial cost-sharing program for Canada's national health care system, and they establish the rate at which these services are compensated.<sup>77</sup> Certain aspects of reproductive technologies have already received the attention of provincial regulators. Questions of artificial insemination, IVF, and preconception contracts have been studied by a few provincial law reform bodies. A correlative of provincial autonomy is the possibility of a patchwork of provisions conducive to forum shopping and procreative tourism.

It is much easier to list the respective jurisdictions of each level of government than to state who has authority to respond to a problem. Not only has the judicial interpretation of many important powers undergone numerous significant restatements, but so much depends on how the problem is defined. It is supposed to be the substance of proposed state action that determines which level of government is authorized to pursue it; this pursuit often involves fine matters of characterization.<sup>78</sup> For example, it is often difficult to determine the extent to which a province can permissibly create offences. 79 Provincial legislation, which sought to make it an offence for a woman to have an abortion without the written consent of either her husband or parents, was struck down as an unconstitutional and impermissible invasion of Parliament's jurisdiction over criminal law.80 provincial law that provided for significant penalties for performing abortions in a private clinic was also struck down.81 Although provincial jurisdiction is limited in this way, provinces have many regulatory powers over reproductive technologies.

National standards on reproductive technologies may be difficult to achieve given the limited extent of Parliament's jurisdiction in this area. While the federal government may seek to exert its influence, without relying on the federal spending power or some form of cooperative federalism, the encouragement of uniform provincial laws may become a principal means of achieving consistency. Another way of reducing interprovincial

disparity is the recognition of constitutionally entrenched, and nationally shared, rights and freedoms.

#### The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms, found in the Constitution Act, 1982, forms part of the supreme law of Canada. The Charter applies to state action, not private relationships; binds federal and provincial governments; and establishes a new balance between the legislative, executive, and judicial branches of government. It protects certain rights and fundamental freedoms, subject to the state's ability to impose reasonable limitations under section 1, or to expressly declare, under section 33, that its action will operate notwithstanding a Charter breach. The judiciary now has the ability to police the content of state action for compliance with the Charter, and to declare inconsistent acts to be of no force or effect. The judiciary also has a wide range of remedies: whatever it considers "appropriate and just in the circumstances."82 The Charter gives an expanded role to the judiciary to engage in what has been called "remedial law": deliberate, comprehensive, and often complex court efforts to change the organizational behaviour of public institutions judged to have violated Charter rights.83

The Charter represents a major paradigm shift in Canadian law. Legislative bodies were once supreme and sovereign within their legislative competence; now the courts can decide that certain actions cannot be undertaken by either level of government. What the content of legislation is becomes a secondary consideration to what it can or ought to be under the Charter. The Charter establishes the outer limit of invasive state action and gives individuals rights they can assert against the government in independent legal proceedings.

There are two qualifications to this view of the Charter. First, it is important for policy makers to recognize that the Charter merely establishes the minimum respect that must be accorded to recognized interests. It is the floor below which state action cannot fall, but it does not operate as a ceiling on how a right or interest can be protected or promoted. This means that the basic Charter entitlements of certain groups, such as women, may be exceeded.84 It also means that governments may grant legislative protection to interests that are not contained in the Charter as long as established Charter interests are also respected. For example, it is unlikely that the unborn fetus, whether in or ex utero, will be recognized as possessing Charter rights.<sup>85</sup> Every indication suggests that the Supreme Court will continue to maintain the established legal principle that legal rights vest only at birth.86 This does not mean that legislatures may not provide protection for what the Charter does not protect. The important caveat in this context is that state action protecting the embryo or fetus is required to conform with the recognized Charter rights of women.

Second, the Charter should be seen as more than a limit to state action or an instrument individuals can invoke to challenge state action,

although these are important functions. The Charter can, and perhaps should, be approached as the prism through which issues are identified. problems are analyzed, and solutions are devised. Rather than policy makers inquiring as to what they must do to pass constitutional muster, they should ask what they can do to promote Charter interests and help remedy the social ills the Charter seeks to address. The Charter can be used to shape law at its foundations, as well as to police it after it comes into force. In this way, Charter principles may influence all levels and aspects of decision making. For example, Charter principles may help decision makers select between competing classifications of what the problem is: in relation to powerful drugs that induce superovulation, is the main danger the potential harm to women's bodies or the creation of spare embryos? The Charter may suggest that there has been too much talk about the "rights" of embryos and not enough consideration of the welfare of women. Or Charter principles may help determine whether a particular choice of legal control, such as criminalization, is appropriate. The rights and freedoms contained in the Charter should, therefore, have a significant impact on the Commissioners' deliberations.

Even if the role of the Charter is limited to a means of challenging state action, there is no doubt that the Charter protects previously unrecognized or new interests.<sup>87</sup> The difficulty is in determining which interests will be protected and to what extent. The Charter has encouraged people to speak in terms of "rights talk," a discourse where wants and needs are elevated, sometimes improperly, into the language of legally enforceable rights. In response, the Supreme Court of Canada has warned that the Charter is not "an empty vessel to be filled with whatever meaning we might wish from time to time."88 To help differentiate competing claims over which rights have been constitutionally entrenched, the Court uses a purposive interpretation to the open-ended statements found in the Charter. Under this model, individual sections are interpreted according to the interests they are intended to protect.<sup>89</sup> The constitutional text is analyzed by reference to the character and the larger objects of the Charter itself: the language chosen to articulate the specific right or freedom and the historical origins of the concepts enshrined in particular sections. The purpose of the Charter is to provide for the unremitting protection of individual rights and liberties; it is to receive a large and liberal interpretation.

Even if the Charter is approached only as a vehicle to enforce rights or set limits, a successful claimant must establish that the challenged state action breaches a Charter right. Charter guarantees apply directly to conduct that qualifies as state action because constitutional documents generally seek to regulate the interface between the government and its citizens. Relevant forms of state action include executive decisions, statutes, regulations, delegated decision making, and any activity with significant links to the state. Charter provisions do not, however, directly control the conduct between non-state actors; so-called private or non-state

action is the realm of human rights legislation. 90 In a recent case, the Supreme Court held that because hospitals were not state actors, their mandatory employee retirement policy could not be challenged under the Charter. 91 Disputes between private individuals will be resolved under applicable provincial or federal human rights legislation. While particular provisions vary, most acts require that services available to the public be delivered in a non-discriminatory manner. 92 The Supreme Court has repeatedly interpreted and applied anti-discrimination norms in a similar way, whether their source is human rights legislation or the Charter. 93 For example, if workplace restrictions on women were found in a statute, the Charter would apply to that form of state action. A company policy outlining the same limitations would be subject to federal or provincial human rights legislation. But in both cases, the analysis would focus on the fact that such restrictions improperly target women and falsely assume that only women contribute to the genetic make-up of children, and that only women are capable of becoming infertile. To control women in the name of some people's view of fetal health, and by direct exclusion from designated employment opportunities, rather than creating a healthier work environment for both potential parents, would likely be seen as prohibited sex discrimination under the Charter and human rights legislation. This parallel interpretation of similar legal norms also has implications for nondiscriminatory access to reproductive technologies.

If the threshold of the state action requirement is met, a claimant must establish that the purpose of the impugned state action contravenes a recognized Charter right. Courts consider the intent behind the state action and how it operates in fact. For example, in addition to the obvious equality implications of sex-specific workplace restrictions, there is an argument that the effect of such legislation may encourage women to undergo sterilization to avoid being transferred out of their posts, a potential deprivation of their section 7 interest in life, liberty, and security of the person. The real-life consequences of government intervention are thereby considered. In addition, attaching unlawful conditions to the exercise of a right may be as constitutionally offensive as a direct deprivation — such as any form of state action requiring a woman to "agree" to abort if the prenatal diagnosis uncovers the presence of a disability, or forcing a person to "donate" eggs or sperm, or to find someone who will, before a desired procedure will be performed.

The Charter issues raised by reproductive technologies are too numerous and complex to be addressed in an overview of the legal system. The question of the extent to which the Charter, especially section 7, includes a right to state-supported or technologically assisted reproduction raises numerous issues. For example, is there a right to know about one's genetic heritage such that the state is obliged to maintain a registry of information? Does section 15 guarantee equal access to the technologies? Can a best-interests-of-the-child standard be used as the test for access to preconception services when it is not used in comparable decisions by

natural parents? These questions are examples of the long list of emerging Charter issues.

In approaching any question about human reproduction, it bears mentioning that one purpose of the Charter was to enshrine equality, especially sex equality, as an organizing principle in Canadian society. Canadian women fought for the inclusion of a substantive guarantee of equality rights (section 15) and an interpretative imperative that all Charter rights are granted equally to men and women (section 28). Under a purposive interpretation, this political energy must flow to the interpretation of individual provisions to ensure that women's needs are translated into constitutionally protected interests and that women are treated as equal citizens. Just as part of the Commission's mandate is to determine what these technologies may mean for women, courts now face the challenge of fashioning a genderinclusive theory of equality and accommodating the different, immutable, and complementary roles women and men have been assigned in relation to human reproduction.94 The Commission and the courts should be guided by the words of the Supreme Court: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component."95

Equality is a comparative concept, which requires a consideration of the overall social and political context in which the question arises. In this regard, it is important to understand how a narrow view of women's biological destiny has historically been used as the pretence and justification for imposing special legal burdens on women's rights and women's bodies. In the past, before entrenched equality rights, a special case was always made to support unique forms of control on women, because they were women and because they could bear children. What began as a potential was soon imposed as a limitation. The Supreme Court has recognized how central various social and legal controls of women's reproduction have been to women's history, experience, and relative inequality. It has struck down a criminal prohibition against abortion;96 prevented a man from obtaining an injunction to stop a woman he had sex with from having an abortion; 97 concluded that a company insurance plan, which gave less protection to women claiming maternity leaves, discriminated against female employees on the basis of their sex;98 and disallowed an involuntary sterilization of a mentally incapable woman.99

The Charter implications of these cases for women who want to bear children, but are unable to, are not quite clear. It is safe to say, however, that women cannot be valued in traditional ways, that is, exclusively or primarily for their reproductive potential. Women must be approached as a separate presence in any reproduction-related process: as speakers, as subjects, and as morally responsible decision makers. The Charter protections mean that women should not be treated as objects, or as a means to an end. They should not be considered only as part of a larger family unit, protected only when they embody the ideal of traditional

motherhood, or portrayed as acting in conflict with the best interests of either a fetus or society. A pregnant woman cannot be treated as a place, a site for the development of genetic material; she must be respected and protected as a person involved in a unique relationship.

The social context of women's inequality may be especially important. in relation to non-commercial surrogacy agreements where the questions of who gives and why they give are important. Some suggest that the act of surrogacy can be placed into separate categories depending on whether it is motivated by voluntarism or supported by commercialism. Under an equality analysis one must question whether allowing voluntary surrogacy results in a moral celebration of women's altruism and a feeding of the cultural stereotype of the "special" ability of women to give, even of themselves, to satisfy the needs of others, in a society in which women are not equal. One author comments, the "unexamined acceptance of women as reproductive gift givers is very much related to a longstanding patriarchal tradition of giving women away in other cultural contexts — for sex and in marriage." By adopting equality principles, this Commission may avoid the criticism levelled at the Warnock Report, that it undermined women's autonomy with its "doctor knows better and the state knows best" thinking. 101 In the strongest of terms, sections 15 and 28 counsel against using the male experience, traditional stereotypes, or "paternalism" as the norm and suggest that the individual and collective interests of women must be the focus. 102 The Charter's equality guarantees provide for a group rights analysis, which, if not women-centred, must at least be womensensitive.

Section 1 acknowledges that certain limitations on Charter rights are possible and proper. When a claimant establishes that state action contravenes a Charter right, the burden of proof shifts to the government, which must establish that its action is reasonable, prescribed by law, and demonstrably justified in a free and democratic country. The interest pursued by the government is required to be sufficiently pressing and substantial, and carefully and proportionately tailored to meet the desired end. In relation to other laws on human reproduction, the state tends to assert an interest in public morality, public safety, and the preservation of the birth rate. There is also some expectation that the government will provide protection against hazardous practices and products. The birth rate justification for state intervention may be problematic for legal controls on reproductive technologies because the issue is not population control in the traditional sense of large-scale social policies that attempt to influence the birth rate to reflect changed economic, political, or ecological conditions. Currently, reproductive technologies raise issues that tend to be limited to the infertility problems of particular people. However, the government interest may go beyond population as a number, to include the broader notion of the human condition and the design of humans themselves. Reproductive technologies raise the relationship between the few and the many in numerous ways. For example, some activities are

problematic only if they are adopted on a widespread basis — where only repeated private choice would generate public concern.

#### The Canada Health Act

The Canada Health Act<sup>103</sup> reads like the Health Charter for the people of Canada. The Canada Health Act's criteria are framed in wide terms and are intended to establish broad norms of social justice. For example, section 3 states:

It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

The preamble to the Canada Health Act is equally explicit: "continued access to quality health care without financial or other barriers will be critical to maintaining and improving the health and well-being of Canadians." The underlying philosophy of the Canada Health Act is, therefore, that all residents are entitled to universally accessible personal health services. Medically necessary services are provided based on people's medical need and not on their ability to pay. The goals of the act are clear and are reflected in the five criteria of comprehensiveness, accessibility, universality, portability, and public administration. But these criteria are undefined and these legal norms are virtually impossible for a private citizen to enforce, even when a provincial plan fails to meet each of these criteria and is in breach of the Canada Health Act.

The purpose of the Canada Health Act is to give statutory form to the federal-provincial cost-sharing agreement on health care. The act establishes the criteria that provincial health care regimes must meet before the federal government will make full payment to the province. As a federal statute, the Canada Health Act has no special legal significance; it can be unilaterally amended or repealed by the federal government. Under a separate agreement, the payment of federal funds depends on provincial compliance. The result is that this cost-sharing program gives the federal government influence within areas of primarily provincial jurisdiction. It seems an anomaly of constitutional law that the federal government may spend where it cannot legislate but provinces are, in theory, free to accept or reject the federal funds. If the provinces accept the federal money, they accept it subject to the attached federal stipulations. Again, these arrangements have no constitutional status and can be changed or terminated.

## Canada's International Obligations

As a nation state, Canada has relationships with other nation states. This subject is referred to as public international law. Its focus is on the obligations assumed and owed between countries. There is also a body of law known as private international law. It establishes the principles that govern the legal relationship between citizens of different nation states.

When people from different countries have dealings with each other, there must be some way of ascertaining what legal rules, and which legal regime, will govern their relationship. These principles determine whether crossborder surrogacy arrangements could be enforced in Canada. This involves complex determinations.

On the public law side, Canada's international commitments may influence the choice of legal controls on reproductive technologies in two primary ways: by establishing legal obligations for Canada as a nation, and by acting as an interpretive source when Canadian courts apply the rights and freedoms in the Charter.

Canada is a party to international instruments under which it has assumed obligations. As a nation, it is bound by its covenants in the international arena and may be pursued for non-compliance. Some of Canada's international obligations may even form part of our domestic law. 107 The international instruments that bear directly on reproductive technologies have been signed by Canada, but have not been expressly implemented by legislation. These instruments include the International Covenant on Civil and Political Rights, 109 the International Covenant on Economic, Social and Cultural Rights, 110 the Optional Protocol on Civil and Political Rights, 111 and the Convention on the Elimination of All Forms of Discrimination Against Women. 112 Canada's recent membership in the Organization of American States also makes the American Declaration of the Rights and Duties of Man relevant. 113 For example, if Canada prohibited access to certain technologies or provided partial or discriminatory access, there may be an argument that it was in breach of its international obligations. In these cases, allegations of breach and the imposition of remedies take place at the international level, where implementation and enforcement are chronically and structurally problematic.

Canada's international commitments will be important sources of information when interpreting Charter rights because of the similarity in their wording, subject matter, and conceptualization. The universality of the human body and the international nature of scientific and medical technologies also increase the salience of an international perspective. So in deciding whether Canadians have a Charter-based right to the means of technologically assisted reproduction, our courts may look at Canada's international obligations for guidance. Canadian courts have shown that they are willing to invoke international standards as models of interpretation to help define the content of Charter rights and freedoms. 114 For example, in R. v. Oakes, the Supreme Court turned to other human rights documents as evidence of the widespread acceptance of the presumption of innocence. 115 In Re Public Service, the Chief Justice said, "I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."116 There is also a presumption that Canada does not intend to violate international obligations and that,

whenever possible, the Charter should be interpreted in a manner consistent with those obligations. 117

# Forms of Legal Regulation: Choosing a Type of Law

There are many forms of legal control or legal instruments, and there are different ways of dividing them up and choosing between them. A main division is between responses based on a command-and-penalty model and those that involve non-coercive alternatives such as regulatory incentives or persuasion-based programs. This section will canvass criminal prohibitions, regulatory powers, licensing schemes, delegated decision making, private law mechanisms, and alternative forms of legal control. The Law Reform Commission of Canada suggested that many factors affect the legal instrument chosen to implement policy. Important considerations include how quickly the instrument can be implemented; how much the instrument costs; how formal the instrument is; how the instrument may change the relationship between the person subject to the policy and the administrator; and how certain the instrument is likely to be in achieving its goals. 118

It may appear that these different instruments can be used together in an infinite number of combinations, but some combinations may not have the desired effect of complementing the other. If one is good, two may not be better because the use of one may actually jeopardize the policy pursued under others. The selection of legal controls should be monitored, in an overall sense, for internal consistency and policy coherence.

#### Criminal Prohibition

A criminal prohibition typifies the command and penalty model of law. By outlining what "thou shalt not do" under law, prohibition conveys high levels of societal disapprobation, entails a social stigma, and provides significant sanction, often imprisonment. The theory is that criminal prohibitions deter crime, and that swift and continuous legal sanctions encourage individuals to engage in legal behaviour. Although some criminal offences are found in subject-specific statutes, most are found in the Criminal Code, a federal law said to define most of the crimes of concern to a modern industrialized society. The criminal law has its own package of underlying principles, norms, and procedures, whose suitability should influence whether a criminal prohibition is a proper way to address the identified problem.

The Law Reform Commission of Canada contended that the major function of criminal law is to protect the core values of society. It believed the following four principles should guide the criminalization of conduct:<sup>119</sup>

- 1. whether it seriously harms other people;
- 2. whether it so seriously contravenes social values as to be harmful to society;

- 3. whether the necessary enforcement measures will not themselves contravene social values; and
- 4. whether the criminal law can make a contribution to dealing with the problem.

These principles are helpful because they structure the debate. systematize the approach, and convey the seriousness of criminalizing conduct. Even though some may contest the choice of principles, the real difficulty is applying them to a given set of facts because they are not selfexecuting and do not provide answers on their own. Individual decision makers may have very different opinions on what harms others, what is a serious contravention of societal values, when law and order are required, and when criminalization is considered invasive and illegitimate. For example, the Law Reform Commission used these principles in its document, *Crimes Against the Foetus*. <sup>120</sup> Even though the analysis appeared coherent, the National Association of Women and the Law disagreed with the Law Reform Commission's conclusions and how they evaluated and applied each principle. 121 So even an accepted and systematic framework will not insulate particular conclusions from scrutiny. In applying these principles, the information gathered by the Royal Commission on the public's perceptions concerning new reproductive technologies and how it is interpreted will be important evidence on whether the requisite level of social abhorrence exists.

In principle, the criminal law power should be used only where other means of social control are inadequate. When invoked, it should not interfere unnecessarily with individual rights and freedoms. These principles are lost if criminalization is approached as a first choice rather than a necessary alternative. One author reports that even though the command and penalty model is inefficient, is costly, and delays technological progress, it is often seen as politically advantageous because criminalization has a high symbolic value. Voters identify a prohibition with legislators taking a tough stand, even if other forms of legal control may actually increase the benefits to the public. It may be difficult to overcome the notion that the widest possible variety of weapons at hand is needed to combat what some see as a growing threat to public health and safety, but the appearance of a bigger gun or the ultimate sanction may not actually improve the problem — it may simply give the illusion of taking control.

Canada has had a long history of criminal offences relating to human reproduction. In fact, birth-related crimes still exist today. While there is a precedent for criminal law regulation, the experience with the prohibitions on contraception and abortion provides useful insights into its limitations in the context of human reproduction. Until 1969, the sale and advertisement of contraceptives were criminal offences in Canada. The primary targets of the prohibition were the financially interested advertiser, publisher, and merchant. Parliament did not choose to criminalize the

use of contraceptives: targeting individual users had the political drawback of appearing oppressive and excessive and presented the pragmatic diffi-culty of being almost impossible to enforce. 126 Even the prohibition against the commercial aspects of contraceptives was not really enforced. Despite the rarity of both prosecution and conviction, however, the criminal law treatment of contraceptives played an important symbolic role and had enormous practical effects. By creating a crime, the government sent the clear message that there was a perceived danger to society if women and men were free to control their own fertility. The prohibition against the sale and advertisement of contraceptives had the indirect effect of making birth control devices, and information about them, more difficult to obtain. The dearth of accurate, readily available information operated as a means of social control and led many women to jeopardize their bodily integrity by pursuing unreliable information and dangerous preventatives. Although a provision directed at contraceptives appeared to apply with equal force to both sexes, it was clear that the restrictions on the availability of contraceptives disproportionately affected women, the group that physically reproduces the species. In addition, the stigma created and supported by criminalization remained attached to the topic of birth control for years.

This contraceptive-related crime was repealed in 1969 and replaced with a medical model of regulation where the state emphasizes public health rather than public morality. The federal government accepted arguments that continued criminalization was an unwarranted interference in the private lives of married couples; that it discriminated against the poor because it had a chilling effect on the public services provided to them; that it encouraged inaccurate product labels because contraceptives were often erroneously labelled as "feminine hygiene" products; that it was so widely disregarded by so many that it had become a "serious hypocrisy," which bred disrespect for the law generally; and that criminalization stood in the way of a more comprehensive, health-oriented approach to contraceptives.

Many of these same arguments were raised against the government's criminalization of abortion. Until 1988, the criminal law power was the main way the federal government sought to place legal limits on abortion. Over the years, the nature of the prohibition has been redefined, and the evidentiary requirements have changed. At first, it was only a crime to perform an abortion; but then it became a crime for a woman to have one. Criminality has turned on when the abortion was sought, on why the abortion was sought, or on some combination that disallowed certain abortions at designated times or under specified terms and conditions. Penalties have ranged from death to the most recent suggestion of a two-year maximum sentence. Like the prohibition against contraception, law enforcement agencies focussed their attention on those who supplied abortion services.

Even though women who obtained unlawful abortions rarely went to prison, the criminal prohibition had a direct impact on women's lives. It

deterred them from seeking or obtaining abortions. A legislative statement, especially criminalization, has the potential to influence and dictate individual conduct. Criminal prohibitions exert moral suasion and encourage people to interpret their life experience in a particular, state-sanctioned way. Criminalization also restricted safe and timely access because the fear of criminal liability skewed the market, restricted the supply, and limited the acceptability and availability of even lawful abortion services. Defining abortion as a crime tended to stigmatize women as criminals, even if they were not "caught," charged, or formally punished. By dictating to women and labelling abortion as a crime, the State reinforced the stereotype that women cannot be trusted to act as morally responsible decision makers.

Since the Supreme Court of Canada struck down the criminal abortion law in 1988, abortion has become part of the larger health care system just as contraceptives had before. This trend is consistent with worldwide trends, where abortion is seen increasingly as a medical service that should be provided as a proper part of a country's health and social welfare programs. The absence of criminal sanction does not mean Parliament is advocating, approving, or condoning a practice: permission is not promotion.

The experience with the criminalization of contraception and abortion indicates that while criminal prohibitions may involve strong symbolic statements, they may exact a high cost. Introducing a new crime may have a more negative impact than the failure to provide a positive effect. It can restrict individual freedom, undermine equality rights, detrimentally affect regulatory efforts, and divert resources that could be better used elsewhere. The continued relevance of traditional notions of criminal law to health, safety, and scientific development should be carefully scrutinized.

Consideration should also be given to the special norms and procedures of the criminal law. For example, the severity of criminal sanctions is said to carry a requirement that individuals are capable of knowing, beforehand and with relative certainty, whether they are engaging in criminal conduct. Thus, criminal prohibitions should be carefully tailored: the practical difficulties of finding realistic language to describe what is prohibited must be overcome. In addition, legislators must choose what level of moral culpability is required to commit a particular offence. The prevailing notion is that only the morally blameworthy should be convicted, and criminal liability is generally conditioned on the presence of a guilty mind, or mens rea. There are, however, other types of offences, such as strict liability and absolute liability offences, which focus more on the conduct than on the mindset that accompanied it. The seriousness of any proposed criminal offence must also be determined. 129 The other important norms of criminal law include the idea that the accused can be convicted only if the Crown establishes guilt on the stringent standard of beyond a reasonable doubt, and that the punishment should suit the crime.

In thinking about whether certain conduct associated with reproductive technologies should be criminalized, its relationship with traditional police enforcement activities should be considered. There is a massive commitment of public resources to redress breaches of the criminal law; because individuals may be victimized, the underlying notion is that a criminal offence is a public wrong. In most cases, after a person complains to the police there is an investigation; the Crown takes charge of the case as the representative of the state; the accused is charged and sometimes tried in court, either by judge or by judge and jury; and if the accused is convicted, a punishment is imposed. The accused obtains a criminal record and is often deprived of his or her liberty, if only by being taken into custody. It may be especially helpful to inquire whether there should be expenditures to collect evidence, provide surveillance, initiate detention and formal sanctions for prosecutions, and enforce prescribed penalties to control the conduct in issue. In essence, will the problem respond to the "cops and robbers" underpinnings of criminal law or should the matter be approached more as a joint venture where the state works together with those interested in reproductive technologies to protect the public interest? In relation to reproductive technologies, it may be difficult to justify new penal and sentencing powers if they raise the possibility of any form of pregnancy police.

This Commission has received submissions requesting the criminalization of various types of conduct, including the following:

- prohibitions against commercialization of reproductive goods and services;
- removing genetic material from a woman's reproductive organs without her knowledge and consent;
- harvesting live fetal tissue and organs for cosmetic medical experimentation;
- using organs from living anencephalic infants;
- aspects of surrogacy and the commercialization of preconception contracts;
- criminal sanctions or compulsory confinement and treatment of pregnant women to protect the fetus from the conduct of its mother.<sup>130</sup>

The majority of reports recommend either the prohibition or strict regulation of experimentation on the embryo or embryonic tissue. In England, there are prohibitions against commercial surrogacy and certain forms of research on human embryos.

Criminal law is mainly concerned with creating prohibitions and attaching penalties to them. It triggers concepts like blameworthiness, punishment, and responsibility and involves consideration of police enforcement. In considering whether the Commission should recommend the use of this stringent form of a command and penalty model, it should

be understood that the criminal law power can be used to stigmatize conduct while doing little to control it.

#### Regulation

The power to regulate includes the ability to control almost all aspects of a targeted activity, including its interdiction. While criminal prohibitions proscribe certain conduct, the purpose of regulatory powers is to outline the terms and conditions under which an activity can lawfully take place. Regulatory powers are designed to take control of the conduct that may occur, rather than to say that it should never happen. Regulatory powers are often used to establish standards; outline requirements, duties, and obligations; establish remedies for breach; and pursue a variety of goals. The many types of regulatory powers allow decision makers to tailor legal controls to identified problems. From a policy standpoint, regulatory powers are highly valued and frequently invoked because they allow a great degree of specificity, control, and detail.

The use of regulatory powers is commonplace across a wide spectrum of issues and already exists in relation to certain aspects of reproductive technologies. Canadians are used to regulations concerning quality and competence, public health, safety standards for products, and professional qualifications. Many briefs to the Commission asked for the national regulating and monitoring of new reproductive technologies, standardizing their delivery and ensuring that adequate statistical information is compiled and available so that their safety and effectiveness can be evaluated. Regulatory controls on certain forms of scientific research have also been suggested.

The potential scope and flexibility of regulation-based legal controls are best illustrated by way of an example. 134 Consider the problem of ensuring the informed decision making of a person considering the use of a new reproductive technology, say IVF. Currently, disclosure requirements are set under the private law notion that a physician has a duty to disclose all material facts and risks in a procedure, in an attempt to secure a patient's genuine consent to what would otherwise be a bodily invasion. 135 As a result, physicians disclose what they consider to be appropriate in the circumstances. If they fail in this duty, and damage results to the patient, physicians may be liable to compensate the patient by way of monetary awards. There are drawbacks to this approach if the policy goal behind the present legal rule is a truly informed and enlightened patient consent. First, if doctors breach their duty and the patient suffers no legally recognized damage, there is no sanction. Second, it may be difficult to prove the physician was negligent in the legally relevant sense. Third, even when all the legal requirements are met, many individuals do not sue physicians. Fourth, in determining what should have been disclosed, courts look to the customary practice in the industry; this self-selected standard may be lower than what is needed or desirable to protect patients. Fifth, the patient's remedy and the physician's liability are limited to monetary awards.

Those who believe that this standard of disclosure is inadequate for reproductive technologies may rely upon regulatory powers to realign the physician-patient relationship in significant ways. Regulatory powers could be used to create defined and mandatory disclosure requirements in an attempt to overcome many of the drawbacks outlined above. In establishing a regulatory framework, there will be questions concerning how tightly the regulatory jurisdiction is to be defined, who should define it. who should enforce it, and how fully the criteria are to be enumerated. For example, just on the latter point of legally required criteria, there are numerous options. Legislation could prescribe all the information that must be given for certain procedures and that information could vary for different procedures. Legislation could also require an explanation of the nature of the procedure and treatment alternatives; outline a required format for statistics about success rates; and detail when information must be given. Legislation could determine whether the consent must be in writing: whether some form of counselling is required or suggested; whether the information must be supplied by an independent person not involved in the performance of the procedure; whether the experience of others undergoing the same form of treatment should be made available to them; or whether there must be a waiting period between the consent and the procedure. A regulatory power can also accommodate a wide range of potential remedies: it could be an offence to perform any procedure without providing the information prescribed by regulation; 136 fines for breaches could go to the supervisory authority or to the patient; patients could receive compensation directly, whether or not they suffered any physical damage; any relevant licences could be suspended or revoked on proof of breach; a list of non-conforming physicians and institutions could be kept and publicized; and so on. This type of regulatory control resembles truthin-lending requirements and would be premised on the belief that properly informed individuals make better choices. While there may be the appearance of state protectiveness, as long as there is no veiled or indirect attempt to force an individual to make a particular choice, this type of regulatory control should not be problematic constitutionally.

Regulatory powers can also be used to deal with broad, complex, and inter-related issues. For example, regulatory controls on informed consent could also address other ways in which the integrity of the patient's consent can be impaired; for example, where a desired treatment is conditioned upon the patient's performance of some requested act. If women seeking IVF are asked to donate "extra" eggs or to find someone else to do so on their behalf, whether or not the donation is expressly made part of the deal, institutional concerns over egg supply are given priority over the free choice of patients. In these cases, there is much room for undue influence and improper pressure because the women may believe that eligibility is premised on compliance with the communicated conditions.<sup>137</sup>

Legal regulations on disclosure could also address what prenatal diagnostic information should be available — especially if a selected policy goal is to minimize what may be perceived as improper sex selection.

In most cases regulatory requirements and duties are supported by some form of offence. For example, it could be an offence to engage in a certain form of conduct without adequate disclosure, or without providing the administrator with advance notice or a subsequent report. Although many such offences exist, they are rarely enforced when breached because prosecution is expensive, slow, and uncertain. It often occurs that an administrator may determine that the adversarial nature of prosecution may damage an ongoing relationship with the governed, so less formal ways of inducing compliance and promoting communication may be attempted. The threat of penalties, however, may give the authorities a stick in negotiating for compliance.

For regulatory offences to operate effectively, there must be a steady flow of information concerning the activities of the person or activity being regulated. Often, these persons are subject to extensive reporting requirements and, therefore, generate most of the information themselves. Sometimes the main reason for a regulatory regime is to obtain information or to provide a window into an industry. Such regulations should have a genuine purpose so there is an independent reason for the conduct, other than complying with legal requirements. Introducing regulatory requirements can be a cost-effective vehicle for policy makers, but it imposes compliance costs on those subject to them. For example, increased disclosure to patients would take time and cost money.

Two further limitations of regulatory systems should be noted. First, there are often inspectors, investigators, and others who are given powers of search and seizure. These powers raise concerns over the use to which the information is put, its confidentiality, and the expense and disruption required to produce it. Second, there should be an understanding that while regulatory controls may shape conduct, they may not change attitudes. For example, even if all these regulatory provisions on informed patient decision making became law, it might not spark or sustain a true desire to enlighten the consumer of medical services.

Regulatory requirements are an adaptable and varied form of legal control, which can be used to specifically address identified problems. In many cases, regulatory controls involve licensing provisions or confer authority on some body either to make subordinate legislation or to engage in discretionary decision making. Both subjects of regulatory controls are studied separately in the following sections.

### Licensing

Licensing is a flexible form of legal control on human conduct; its purpose is to bring a proposed activity under official scrutiny. Licensing involves the establishment of a competent authority, the licensor or licensing body, that is vested with the power to give permission to an

individual, the licensee, to do acts that, without such authorization, would be illegal. In essence, it is a statement by government that "you" must have "their" approval before "you" proceed. This particular form of legal instrument is extremely far-reaching; it may apply to an extensive array of activities, persons, and things. 139

The rationale for licensing controls is to prevent foreseeable harm and unwanted consequences by controlling activities and those who engage in them. Licensing is especially appropriate for cases where the harm that may occur would be hard to undo. It is not like criminal law, which seeks to punish wrongful conduct, or tort law, which awards compensation to the victim after the fact and finds fault on the part of the tortfeasor. Licensing schemes seek to influence conduct by requiring individuals to obtain permission before engaging in an activity that is otherwise not permitted. Licensing can also be used to distribute a limited number of opportunities among would-be entrants. Specific objectives for various licensing schemes have included the

- regulation of dangerous or potentially dangerous activities to ensure public safety (e.g., nuclear power);
- control of activities that might endanger public health (e.g., food processing, liquor sales, and consumption);
- protection of the welfare of the helpless, the young, and the infirm (e.g., through the regulation of nursing homes and daycare centres);
- supervision of activities that might interfere with public rights by constituting nuisances if not regulated (e.g., street vendors);
- acknowledgment and protection of the public element in organizations that provide essential services (e.g., public utilities);
- protection of the public from incompetence by professionals (e.g., medical practitioners, lawyers, etc.) by instituting minimum qualifications for practice; and
- prevention of crimes of dishonesty (e.g., in securities trading).<sup>140</sup>

Licensing is an adaptable mechanism for controlling persons and activities. A variety of objectives can be pursued, many types of structures can be used to grant and supervise licensees, and there are many types of licences. Authorization to engage in "controlled activities" may be standardized or may contain individualized conditions tailored to the qualifications and behaviour of the licensee. Very often, licences are granted subject to terms and conditions that must be fulfilled. This granting method may be important if the licensee has previously breached a licensing condition. In the event of breach, the licensing authority may revoke, suspend, refuse to renew, or grant only short-term renewal of the licence. Applications for licences or renewal applications may be handled confidentially or may be conducted in a public forum where interested third

parties can provide input. The power to grant a licence may be conferred on any type of body, such as municipal, provincial, or federal agencies; a commission, tribunal, government department association; or any other non-government individual or group.

There are certain acknowledged benefits of licensing as a form of legal control. The flexibility in implementing and operating a licensing system is an effective control mechanism, particularly for adjusting licence requirements as social needs change. Licensing may be particularly well suited to some of the problems raised by the new reproductive technologies. The new reproductive technologies raise a number of social policy issues for which no clear legal response is evident because no social consensus exists and because the technologies change with scientific advances. The flexibility inherent in licensing mechanisms would facilitate responsiveness to change, especially if a licensing authority is given a broad mandate with the power to define and implement its own procedures.<sup>141</sup>

Under a licensing scheme, the formality and rigidity in the process of amending legislation can be avoided; each case can be dealt with separately and before the activity has occurred. In this way the unfairness, problems, or embarrassments often associated with retrospective decisions can be avoided. Licensing can usually appear clear and simple, is readily communicable, and can usually be accurately self-applied. Licensing also permits public participation through a number of options: licensing authorities could be established to include members with a broad range of social interests, or the use of public hearings in the granting and review of licences could permit third-party interests to be heard. Licensing schemes can provide effective and fast remedies for transgressions. In contrast to criminal law, licensing provisions provide a customized mechanism for curtailing unwanted conduct and for inducing compliance. Criminal prosecutions have the disadvantage of requiring considerable time and effort to produce sufficient evidence to obtain a conviction — because criminal standards of proof of wrongdoing are oriented in favour of the accused to minimize erroneous findings of guilt. In comparison, it is easier to charge someone for operating without a licence than to prove that they have committed an offence. In addition, revoking a licence, or issuing the equivalent to a stop-work order, may provide a quicker way of halting offending conduct by the licensee than proceeding with a court prosecution. 143

Licensing schemes also permit the licensing authority to develop workable specifics where the legislation under which it operates provides only general directives. Licensing generates revenue and provides a list of licensees. This list has the communication and policing benefits of an official register and may enhance the administration or enforcement of other regulations, even self-applying ones. Licensing also creates an ongoing legal relationship between the licensee and the licensing authority, which may assist in the collection of needed information for future decision making. Licensing may also generate necessary information if post-

requisites are also imposed when licensees are obliged to file a report or do something official after the authorized activity has been done. This information may act as a trigger for enforcement and provide ready access to data.

The Warnock Report was obviously swayed by the potential of this form of legal control and recommended the establishment of a new statutory licensing authority to regulate certain research and fertility services. 144 Practitioners of services, and premises, including storage facilities for semen, human eggs, and embryos, were to be licensed. 145 In certain cases, the licensing requirements were supported by criminal prohibitions such that unlicensed conduct was criminalized.

It is also the inherent administrative flexibility of licensing schemes that may generate problems. There may be a lack of fairness in the way the system operates if decisions for granting licences become subjective or infused with value judgments such that there is the potential for, or the appearance of, the abuse of bureaucratic control. This latter criticism is often directed toward occupational licensing, such as law and medicine, where the licensing authority consists of members of the same profession. It is also important to identify the specific problem the licensing system was designed to prevent so the goal of regulation is not lost. Other disadvantages of licensing systems include that they tend to be administratively cumbersome, they impose heavy burdens on the machinery of government, and they make it hard to regulate a great number of people or transactions. Preventing certain individuals from gaining entry raises the larger question of whether the activity itself is so generally beneficial that it should be delayed, screened, or limited.

Some of the disadvantages of licensing may be avoided if proper attention is paid to articulating the objectives of the licensing system and addressing alternate control strategies. For example, where the objective is to keep track of persons engaged in a particular activity, registration may be preferable to licensing. Similarly, where hygiene and safety concerns are at issue, these may be better addressed through effective inspection procedures. Other options include the state provision of needed services rather than licensing of private parties. In determining the appropriateness of licensing as a control mechanism, it is essential that the procedures developed be fair, efficient, necessary, and, most importantly, directly related to the clearly stated objectives of the licensing scheme. As the effectiveness of any form of legal control depends on adequate enforcement, any application of licensing mechanisms to new reproductive technology issues requires workable procedures as well as adequate staff to inspect for compliance and to respond to infringements by licensees.

# Delegated Decision Making

Delegated decision making occurs when a law-making body transfers some of its authority to someone else. <sup>152</sup> In some sense, the term "delegated" is a misnomer, because when the legislature directs a person

or agency to make a decision or implement a program, it is seen as exercising its power, not giving it away. <sup>153</sup> In most cases, decision-making authority is conferred on state actors or government agencies, rather than on private citizens.

Delegation is commonplace. It has been noted that "the vast bulk of the business of government in fact takes place by virtue of delegated authority instead of being contained in laws passed by either the Federal Parliament or one of the provincial legislatures." Delegation is said to be justified for the following reasons: 155

- The sheer magnitude of the business of government means that not everything could be dealt with by Parliament or a legislature.
- Much of governmental activity is technical in nature, and only broad principles should be contained in legislation.
- Delegating power to an administrator allows greater flexibility in applying broad statutory provisions to changing circumstances.
- It may not be possible to devise a general rule to deal with all cases, which may be more conveniently determined in the discretion of a delegate.
- The need for rapid governmental action may require faster administrative response than can be accommodated by the necessity of legislative amendment.
- Innovation and experimentation in solving social problems may not be possible if legislation is required.
- Someone actually has to apply legislation, and that person has to have authority to do so.
- Emergencies may require broad delegation of powers regarding a wide range of matters that would normally be dealt with by legislation.

The legislature may formally influence the decision maker's objectives, policy, and decision-making criteria. The statutory mandate is the source of authority, and any statement of objectives provides initial guidance. The legislature must consider how "independent" it wants the decision maker to be in terms of its relationship with the legislature or executive; how specifically it wants to frame the statutory rules; and how directly it wants to speak to the statute's ultimate target. The breadth of the delegation is often a function of the complexity of the assigned task. A variety of factors contribute to this decision: the technical complexity of the subject matter, its stability over time, the ability of the legislature to reach a consensus, the number and ability of the legislative staff, and the legislature's confidence in the particular implementation mechanism. The choice of delegated, rather than direct, government decision making is usually made on the basis of considerations of comparative expertise or to obtain any benefits

that may be derived from having a distinct organization, which may be

exempt, at least partially, from civil service rules.

In some other cases, the delegation carries with it the formal ability to enact subordinate legislation. For example, the Minister of Health may be given the power to make regulations on sperm banks. Sometimes the legislature merely confers the ability to apply more or less predetermined rules. Some laws impose duties and require certain decision makers to act in specified ways. For example, a delegate may be obliged to grant a licence on payment of a fee or may be under a duty to inspect. Legislation may also grant the ability to generate the rules to be applied, without establishing a formal law-making power. In these cases, discretionary decision-making powers are conferred. Delegation of discretionary powers tends to be chosen when there is 158

- the difficulty of providing a rule that is applicable to all cases;
- the difficulty of identifying all of the factors to be applied to a particular case;
- the difficulty of weighing those factors;
- the need to provide an easy vehicle for changing the considerations to be applied to the problem over time;
- · the complexity of the issue; and
- the desire not to confer vested rights on a particular party.

New powers can be given to existing bodies and thereby increase their responsibilities, or new forms of organization can be created. Administrative bodies to whom decision-making powers have been delegated have no inherent jurisdiction and will, therefore, have only as much authority as has been given to them. In recent years, there has been an increase in the use of delegated powers. This has led to the emergence of independent administrative agencies: such agencies are intended to divert the responsibility for politically sensitive issues to discrete, non-partisan, governmental bodies; to meet the need for specialization and expertise to manage progressively more complex governmental tasks; and to remedy a perceived inability of the civil service to perform such tasks. They also manifest a reluctance to overburden courts in matters that, because of their nature or their volume, are not seen as suited to the judicial process. 159

Most independent administrative agencies use their statutory powers to determine the existence and scope of private rights, obligations, and privileges. They act within the context of public policy initiatives and the pursuit of regulatory goals. Some agencies perform more of a regulatory function than an adjudicative one. Regulatory bodies, such as the Canadian Radio-Television and Telecommunications Commission or the National Energy Board, make decisions that affect whole industries or parts of them; choose among competing interests; have discretion to establish criteria or alter the way in which they are applied in a given case; and tend to have a

fairly large infrastructure. Adjudicative agencies operate more as "quasi courts" because they apply predetermined statutory rules to particular cases. Any discretion they possess relates to individual outcomes and not to regulatory objectives and policy formulation. Examples include such bodies as the Canada Labour Relations Board and the Immigration Appeals Board. Administrative agencies may also exercise a purely advisory function. A current example is the National Council on Welfare. Of more direct importance to new reproductive technologies, the Law Reform Commission of Canada has suggested that a multidisciplinary Canadian Advisory Council on Biomedical Ethics should be established. The Warnock Report in England suggested the creation of a board to exercise advisory and executive functions — that is, to provide general guidance on good practice and to grant licences for services or research on embryos or gametes. As a result, the Human Fertilisation and Embryology Authority was established under the Human Fertilisation and Embryology Act, 1990; it controls the licences required and granted under the act and provides advice and information to the Secretary of State.

Even when decisions are delegated because they require special technical expertise, data-gathering ability, and problem-solving capacity, the actions and decisions of appointed decision makers are subject to judicial review. The courts supervise discretionary decisions to ensure that they are within the delegate's jurisdiction and terms of reference, which involves an area of law known as "administrative law." Courts review whether decision makers have exercised their powers for an improper purpose, with malice, in bad faith, or by reference to irrelevant considerations. Courts question whether serious procedural errors or certain errors of law were made. The process of judicial review seeks to provide procedural fairness, due process, and a fair hearing within the principles of fundamental justice in an attempt to overcome the perceived problem associated with delegated decision making: that the process creates a system under which the real rules of the game will be developed later, by someone else, and perhaps applied unfairly. Even if the legislature puts in what is known as a "privative clause," a statement designed to establish the primacy and finality of the delegate's decision by ousting the jurisdiction of the courts, the courts have found ingenious ways of maintaining their supervisory function. Despite the apparent breadth of any statutory grant, the delegate is prevented from treating individuals or issues in an arbitrary or discriminatory manner.

As a policy goal the Law Reform Commission of Canada suggested that independent administrative agencies, and, by extension, any actor with delegated powers, should have these attributes:

- they should be politically or legally accountable for their decisions;
- their decisions should be authoritative;

- the system they administer should be comprehensible and accessible to those who want access to it;
- the agency should be effective and economically efficient; and
- the decisions they made must be made fairly, with integrity, and in a principled manner.<sup>161</sup>

The cardinal rule when considering delegated decision making is to inquire who is in the best position to make the decision in question, and who should be empowered not only to decide but to make mistakes.

Delegated decision making occurs frequently, but it does not necessarily foster unrestrained authority. Community involvement can be secured to ensure that decision making is informed and to keep officials committed to public ends. In this respect, the frequency with which the call for public participation on new reproductive technologies is heard suggests that an alternative form of input may be needed.

#### **Private Law Implications**

Private law concerns the legal rules that govern the relationships between people: for example, when a person owes a parental responsibility; how custody disputes should be settled; when a person can claim money damages because another person has injured him or her; or when a promise will be enforced. Private law rules can be contrasted with the type of legal controls that establish rules between a government and citizens in the name of the public interest. Even though criminal prohibitions, regulations, licensing, and delegated decision making may indirectly affect how people treat each other, their primary goal is not to determine private rights and responsibilities.

Important matters of private law raised by reproductive technologies include family law matters, the law redressing civil wrongs (otherwise known as tort law or, in Quebec, as the law of delict), and the law of contractual obligations. These aspects of private law are within provincial jurisdiction because they raise issues of a purely local and private nature. In Quebec, the guiding principles will be found in various articles in the Civil Code. In the other provinces and territories, family law principles are almost all found in statutes, but the common law still governs tort and contract law questions. In the common law still governs tort and contract law questions.

Many submissions made to the Commission address private law matters; this is to be expected because private law responsibilities and personal obligations are what concern people most directly. Legislative intervention is urged across an array of private law issues to codify existing law, make it clear, change it, impose requirements of form, or create new judicial remedies. It is impossible to convey the full range of legal questions raised by the intersection of private law principles and new reproductive technologies. It may be worthwhile, however, to highlight a few key concerns in the areas of family law, civil damages, and contractual obligations as examples of the state's power over private law.

The greatest challenge facing family law principles is that existing technologies make it possible to separate genetic, gestational, and social parenting. 165 The possibility of five different sets of parents strains current legal concepts. Present concepts are rooted in a presumed identity of social and genetic parents and an assumption that the only method of procreation is sexual intercourse between married persons. Tying legal rights and duties to biological links has serious legal implications for gamete donors, gestational mothers, and social parents. Such a legal rule also has social consequences for us all. The choice for policy makers is between assimilating the new into the existing, or redefining the field because its underlying assumptions, which nevertheless continue to represent the procreational norm, are no longer completely valid. If policy makers, consider an alternative model, such as incorporating concepts of parental labour or voluntarily assumed parental duties, they must also decide when it applies. 166 It is important that family law rules clearly articulate individual rights and obligations to avoid protracted and expensive litigation. 167 Not only are issues such as whom the child can look to for support, who has parental responsibilities, or who has rights to custody or access significant in their own right, but many other legal concepts, such as inheritance or the ability to sue under certain statutes, depend upon filiation or legally recognized family relations. 168

Many of the suggestions received by the Commission relate to family law matters. For example, some advocate that the gestational mother should be seen as the legal mother and that the husband of a woman who undergoes artificial insemination should be legally presumed to be the father. Some claim that in surrogacy, commissioning parents should not be compelled to accept the child but should be required to maintain a legal obligation to contribute financially to his or her support. Calls for the preclusion of any legal relationship between the donor of a gamete and the child, and the idea that the model for sperm, ova, and embryos should be based on legal guardianship rather than ownership, have family law implications

The advent of reproductive technologies also has implications for the civil law of damages. The law of delict in Quebec and the law of torts in other parts of Canada outline when an injured person may recover compensation for harm caused by another. Under both legal systems, defendants are liable if they negligently breach a legal duty of care they owe to another and harm results. Most people are familiar with the medical malpractice action in which a practitioner is held liable for the failure to inform the patient of the material risks of the procedure or for failing to perform the procedure in a reasonably competent manner. Even using established principles, reproductive technologies generate some new twists. For example, under common law and civil law, different standards of care are owed by physicians depending on the nature of the medical treatment involved. If a procedure is characterized as experimental or cosmetic, rather than therapeutic, the physician is under more stringent disclosure

obligations to ensure the patient's informed consent. Whether IVF is considered as experimental or as an accepted procedure may have ramifications in certain civil actions. In other cases involving technologies, the more dangerous the technique to the woman and the greater the risk it may lead to a defective child, the more likely a higher norm of medical conduct will be imposed.

In addition to the novel application of recognized principle, a new set of birth-related civil actions is emerging in the United States. 170 Wrongful pregnancy is a claim that another's negligence resulted in a plaintiff's unplanned conception of a child, whether or not the pregnancy is carried to term (a possibility in the context of a failed lavage procedure?). Wrongful conception is a narrower claim that the negligent performance of a sterilization procedure resulted in a conception that should not have occurred. but no child was born due to spontaneous or induced abortion. Wrongful birth is a claim that a health care provider violated a duty owed to a parent to give information or to perform a medical procedure with care, resulting in the birth of a defective child. Wrongful life is a claim by a person born with predictable physical or mental handicaps that, but for the defendant's negligence, the person would not have been conceived or, having been conceived, would not have been born alive. Dissatisfied life is a claim that a person was born with disadvantages of a non-medical nature due to the defendant's wrong, such as the disadvantage of being illegitimate (the child suing the doctors, the lawyers, and the parents for having been born as the result of a surrogacy agreement or being put through a court battle?). These actions can be combined. For example, if the use of IVF results in the birth of a defective child, the parents may sue for wrongful birth, and the child may sue for wrongful life or prenatal or preconception injury.

There has also been talk of creating new legal obligations that pregnant women alone would owe to the fetuses they carry. It is settled law in Quebec and the rest of Canada that after a child is born he or she may recover for injuries, caused by third parties, that were sustained in utero. There is, however, no established authority allowing a similar claim taken by the child against the child's mother. Although the unique relationship between a woman and a fetus means that in no other case will the actions of one so directly and distinctly affect the well-being of another, the complete physical dependence of the fetus has been used both to support and to negate a legally enforceable duty on the mother to take care of herself. Other interesting civil damages questions arise in relation to people who donate genetically damaged material, and whether there will be government liability for a failure to provide safe drugs or if any required licences are distributed in a negligent manner. The primary question is whether Commissioners are content to allow the piecemeal elaboration of principles of civil liability on these matters. In most cases, only some form of moratorium would provide the certainty required to prevent or preclude what may be considered undesirable civil causes of action.

The main private law issue on contractual obligations and reproductive technologies concerns the enforceability of preconception agreements. Both civil law and common law courts will not enforce contracts that are judged to be contrary to public policy. Under existing principles, courts would first interpret the terms of the agreement and characterize the nature of the bargain. Although there is a great diversity of such arrangements, the court would decide if the contract was essentially for the sale of a child or for the services of the gestational mother. A judge would consider whether there was an intention that the gestational or gestational and biological mother would abandon physical and legal custody to the child, whether full payment was to be made even if the child was not given over to the commissioning parents, etc. 171

This is one of the few areas in law where public policy considerations play a visible and determinative role. Competing philosophies and moralities are evident. Groups with conservative leanings are concerned that promises to procreate weaken the traditional concept of family and are, therefore, to be discouraged. Certain religious prohibitions may also arise because preconception contracts usually involve artificial insemination. Liberal theorists tend to focus on the individual's right to contract freely. Accordingly, such agreements will be seen to operate primarily at the level of personal choice and have the effect of allowing women to be paid for the procreative services they have traditionally provided free of charge. Marketplace compensation is proof that women are equal, and payment is seen as a liberating force; but the very economic nature of an exchange set in a society of vast material and social inequality leads some feminists to equate such arrangements with a form of prostitution — men paying for access to women's bodies. In this case, it is women's reproductive rather than sexual services that are in demand. The claim is that women, traditionally objectified as body parts sought by men for sexual gratification, will now be seen as the instruments for providing heirs at a price other than marriage. Many feminists focus on how such contracts would allow stereotypes of women to be reinforced and explore the social factors that led to the woman's "consent" to such an arrangement. Any public policy determination on the enforceability of a contract to procreate would raise many

If such agreements are held to be contrary to public policy, individuals would not be punished for entering into a surrogacy arrangement in the sense of being subject to fines or imprisonment, but the court would withhold legal effect from their bargain. A commissioning couple could not demand the child on the basis of any contractual promise made. If the contract is unenforceable, another legal model is required to sort through the parties' rights and responsibilities. Where the issue dividing the parties is the custody of the child, the family law test of the best interests of the child is the most likely replacement. The courts would approach the matter as a custody dispute over a child whose parents are not married to each other. Under this model, custody can be given jointly to both parents, or

primarily to one with visiting rights in the other, so that any contract clause providing for the total relinquishment of parental rights is not given legal force or effect. This was the approach used by the appeal court in the famous American case of  $Baby\ M.^{173}$ 

In the absence of specific legislative intervention on these private law matters, their legal status will be determined by the courts on a case-by-case basis and according to general principles. It is for the Commissioners to determine whether this essentially evolutionary legal process accords with their analysis of the problem and their assessment of the type and level of intervention deemed necessary.

## Alternative Forms of Control

Law as command and penalty is not the only model of legal control. There are many less formally coercive arrangements, some of which provide financial incentives and others that seek to appeal to moral suasion or public opinion. Incentive-based controls can play an important auxiliary function to other forms of legal control or they can be used independently. Their purposes are to induce a willingness to comply and to oblige decision makers to communicate and define the conduct desired in the same way as under a regulatory scheme. Under this type of program, there is no way of forcing compliance or protecting those who are placed at a competitive disadvantage through their voluntary compliance.

Such a system may operate on the basis of rewards where a benefit is conferred if stipulated practices are adopted. For example, the law of patents does not tell individuals what to research, but the fruits of their labour receive legal protection. Other mechanisms of control include placing conditions in government contracts or grants, even if, technically, there is no power to legislate on that subject matter because the legal authority for the provision derives from the contractual capacity of the Crown and not the legislative division of powers.

There are also many funding-related arrangements that can have a direct effect on conduct, whether or not they take a direct legal form. Placing a moratorium on funding for certain aspects of reproductive technologies would certainly have a different effect than awarding grants for the same kind of research. In recent years, the government has employed many financial incentives to support policy choices, including grants, subsidies, low-interest or forgivable loans, loan guarantees, and tax expenditures. The non-confrontational manner in which such incentives are negotiated makes them easier and less costly to administer than command and penalty model offences, but they raise questions of procedural fairness and the proper allocation of public resources.

Non-legal instruments, such as voluntary codes, are often supported on the practical and philosophical grounds that governments should get out of the marketplace because their interference causes inefficiencies at public expense; that individuals should exercise freedom of choice; that conciliation is to be preferred to confrontation; and that what is needed are flexible

guidelines rather than so-called inflexible legislation. These claims are heard frequently in relation to proposed controls on scientific research, where the law is sometimes seen as a blunt, deadening, and improper instrument. There are often claims that scientific thinking should not be mixed with political ideology and that decisions on what is acceptable research should be left to the experts. The issue is one of control and thus raises political questions. Even if codes of conduct were established, the primary critique of any system grounded in "voluntarism" is that there is no ability to secure compliance and no neutral supervisor to monitor conduct and complaints. To the problem of inadequate sanctions is added the claim that voluntary codes may also encourage a search for the lowest common denominator. Such initiatives may provide the appearance of a response without providing a real solution, and they run the risk of becoming dangerous cosmetics.

The government can also choose to do the thing itself rather than trying to control individuals through direct coercion, regulation, or inducement. Instead of trying to create the conditions under which people can help themselves, the government can elect to provide a public service. The state could, therefore, provide direct assistance, conduct the research, or open the clinic. There are many alternative options that should be considered.

#### The Administration and Enforcement of Laws

In some significant respects, the administration and enforcement of a law are just as important to the attainment of its intended policy objective as its form and content. A progressive law may receive a retrograde interpretation; a harsh law may remain unenforced, and those charged with implementation or enforcement may consciously or unconsciously thwart its purpose. Some appreciation of the factors that contribute to effective legal standards may contribute to an overall understanding of the legal system and may help formulate particular responses to identified problems. Funding for implementation and enforcement and organizational commitment to the goal will have a direct bearing on the success of any legal control. Sociologists have also identified certain conditions under which law has the best chance of effectively influencing behaviour and possibly shaping attitudes. 174 The brief overview in this section on the administration and enforcement of laws is meant to place laws within the context of the legal and social systems in which they will be received, and to stimulate thought, rather than to provide answers.

The current literature suggests that laws can be expected to influence behaviour only if the source is authoritative and prestigious: only then will they be accorded the requisite level of respect and compliance. One author states that legislation, followed by executive orders, administrative agencies, and court decisions, should be viewed in descending order of prestige. The second author says that new law is more easily accepted if

its rationale is expressed in terms of its compatibility with established cultural and legal principles. Third, pragmatic models for compliance must be identified and the law must appear to be practical in its aims. It is best to make it clear that the new patterns of behaviour required by law already exist in some groups, communities, or societies to minimize any societal resistance to apparently untried ideas.

Fourth, policy makers should be conscious of the element of time and timing in legislative action. Legislation often follows specified policy routes, such as certain provisions not coming into force until the statute has been activated, or activated only by ministerial order, or given effect at a later time through the specification of detailed regulations. On the one hand, it is suggested that the shorter the transition time, the easier the adaptation to the change required by law. Some authors suggest that any procedural or policy delays should be reduced to minimize the chance for the growth of organized or unorganized resistance to change. However, the timing strategy of implementation of legislation depends on a number of considerations: the extent and complexity of change the law seeks to bring about: the nature of practices and institutions at which the law is aimed; and the legislator's value judgments in balancing the importance of securing rapid change and minimizing disruptive influences caused by change. In some cases, the conscious programming of legal change in stages over time reinforces and provides reassurance to society that the change is firmly controlled and that the policy is governed by both caution and forethought.

Fifth, enforcement agents must be committed to the behaviour required by law even if they do not support its values, because any evidence of hypocrisy or corruption from an enforcement institution will undermine the law's effectiveness. The Sixth, the use of positive incentives may be as important as negative sanctions, especially where the law actively seeks to promote social change. Finally, effective protection must be provided for the rights of those who would suffer as a result of evasion or violation of the law. There must be, at a minimum, some incentive for people to police infractions. The

# Conclusion

Two basic questions facing the Commission on the relationship between new reproductive technologies and the legal system are whether any legal intervention is warranted to achieve a defined policy objective and what form such intervention should take. The Commission will be influenced in its deliberations on the legal implications of new reproductive technologies by the contours of the existing legal system, the content of current laws, public opinion, and the various proposals it has received. In its recommendations, the Commission will in turn influence the legal system and the law. With an understanding of the social context of law,

the functions of law, its sources, and the role of legal actors, the Commission can begin to frame issues in their overall legal setting. To the extent that law emerges as an instrument of policy, it is crucial to determine not only which policy should be pursued concerning a particular aspect of reproductive technologies, but also what function law can serve best in each case. For any activity, Commissioners must decide whether they want to stop it, control it, shape it, license it, or encourage it. In formulating recommendations the division of legislative power should be understood and the *Canadian Charter of Rights and Freedoms* should become the prism through which the acceptability and inclusiveness of state action are viewed. The Commission's law-making task is more difficult because of the absence of scientific data supporting the effectiveness of certain types of laws to certain forms of policy initiatives or legislative aspirations. The Commissioners are, however, obliged to articulate their reasoning in a clear, cogent, and cohesive manner.

If law is considered a socially situated process, it can be expected that there will be many unintended consequences of purposive and thoughtful intervention. Many social phenomena can intervene to separate, moderate, or dilute a reform from its intended outcome. There should be no expectation that the entire field of new reproductive technologies could be covered at the outset. The Commission will be recommending first-generation laws with the primary purpose of increasing public and political awareness of the potential problems associated with new reproductive technologies. Public attitudes will continue to remain in a state of flux; they will be formed and revised as more information is received.

While the introduction of the framework and guiding principles will set the agenda for the future, Commissioners are not expected to see into the future or to predict and consider every foreseeable occurrence. This is especially true in the case of reproductive technologies where a changing body of scientific knowledge suggests the need for flexibility and a certain amount of legislative improvisation and updating. Any ex post analysis suggests how difficult it is to forecast how even the most structured discretion will be employed in fact or to predict what type of practices may emerge around legally conferred authority. How legislation operates in fact and how it reads are two different things. If law is seen as a process, it is natural that its terms and provisions will be subject to constant claims for revision and reform. When the time comes, change should not be seen as an implied critique of the initial recommendations. At this initial stage in the legislative history of new reproductive technologies, the Commission's law-making task is to establish the groundwork, lay the foundation, and craft the pillars of principle that will support our emerging understanding and growing needs on new reproductive technologies.

# Appendix 1. Summary of a Decision-Making Framework

## What is the "problem" the legal action is intended to address?

- Has the evil to be remedied been expressly defined, properly delimited, and precisely delineated?
- Have the underlying social tensions and causes been considered?
- From whose perspective is the problem being defined?

# What are the social goals and policy objectives of proposed intervention?

# Are there non-law alternatives that may achieve the articulated goals proposed for legal intervention?

- Has private ordering been considered?
- Have the limits to legal solutions been recognized?
- Has the gap between enactment and implementation been considered?
- How will a single provision impact on a diverse population?

#### Currently, is there a law on the topic in issue?

- Is there a specific law governing this point or practice?
- Is there a law of general application that may have implications for reproductive technologies?
- Are any existing legal concepts adequate or are new categories and principles required?

# Does the current law achieve the articulated goals and objectives? If not, what is the primary purpose being pursued by the proposed law?

- to control human behaviour.
- to punish those who contravene prescribed norms
- to resolve conflict
- to articulate and promote a social objective
- to educate the public

# Does the type of law selected suit this primary purpose? What is the appropriate source of legal regulation?

- constitutional instruments
- the Constitution Act.
- the Canadian Charter of Rights and Freedoms
- statutes
- delegated legislation: orders in council, regulations, by-laws, ordinances, instruments, rules, regulations

- · discretionary decision-making powers
- · judicial precedents and pronouncements

## Has the social context of the proposed law been considered?

- Have any hidden values of existing laws been reviewed and understood?
- What social relations does this law create, transform, or preserve?
- Have all relevant social interests been represented equally in the process of seeking to influence decision makers?
- Can this law be justified in relation to its responsiveness to social needs, claims, and interests?
- Who does this law help? Who does it hurt?

# Which level of government has legislative jurisdiction over this aspect of reproductive technologies?

- Is the subject of reproductive technologies an area of exclusive or concurrent jurisdiction?
- Is there a basis for a federal presence through legislation, through the use of the federal spending power, or through the encouragement of uniform provincial provisions?

# Does the proposed state action comply with the rights and freedoms guaranteed in the Canadian Charter of Rights and Freedoms?

- Has the Charter been used as the prism through which issues are identified, problems are analyzed, and solutions are devised?
- Has consideration been given to whether the minimum respect for the rights mandated by the Charter should be surpassed or supplemented?
- Does the recommended state action infringe a recognized interest? If it does, is it a reasonably justifiable limit in a free and democratic society?

Have the perspectives of women, people of colour, the disabled, and the poor been heard, respected, and included?

What is the relationship between the proposed state action and Canada's international obligations?

## What type of law is best suited to the perceived problem?

#### Criminal Prohibitions

- Does the activity seriously harm other people?
- Does the activity seriously contravene social values?
- Will criminal enforcement measures contravene social values?
- Can the criminal law make a contribution to the problem?

- Are other forms of social or legal control adequate?
- Could the criminal prohibition be sufficiently clear and certain that individuals know whether or not they are engaging in criminal conduct?
- Would the prohibition unnecessarily interfere with individual rights and freedoms?
- Will the criminal prohibition be enforced or is its symbolic value sufficient?
- Have the costs and implications of a criminal prohibition been considered?

#### Regulation

Should there be prescribed standards, requirements, duties, and obligations imposed on certain conduct before it should be lawful?

- How carefully have the regulatory controls been tailored to the identified problem and the policy objective chosen?
- How should the regulatory jurisdiction be defined? Who should define it? Who should enforce it? How are the criteria to be enumerated?
- Has a regulatory offence been created?
- Has attention been directed to the optimal level of information needed for the efficient and effective functioning of the regulatory system?

#### Licensing

Is this the type of activity that should be subject to official scrutiny in the form of requiring authorization before the activity is lawful?

- Does the activity carry the risk of foreseeable harm that may be difficult to undo?
- Should the opportunity to engage in this conduct be limited?
- Who should grant and administer the licences?
- What terms and conditions should be set for the grant, maintenance, renewal, and loss of a licence?
- Are standard or individualized licences more appropriate?
- What penalties or remedial regimes should be established?
- How much flexibility is required to meet changing social needs?

## Delegated Decision Making

Should decision-making authority be transferred from the legislature to a delegate?

How independent should the decision maker be?

- What should be delegated? What amount of discretion and detail is appropriate?
- Should the delegate receive the ability to enact subordinate legislation?
- · Which, if any, legal actors are the best-placed decision makers?

#### Have the private law considerations of the proposal been canvassed?

- Should the general rules continue to apply or are specific provisions required?
- Is the case-by-case judicial elaboration of principle adequate?

#### Have other types of control been considered?

- various forms of financial or legal incentives
- voluntary codes
- provision of the activity as a state-run public service

# Has consideration been given to how the proposed law will be best administered and enforced?

- Is the source of the law authoritative and prestigious?
- Is the rationale of the law expressed in terms of its compatibility with established cultural and legal principles?
- Have pragmatic models for compliance been identified?
- What is the best timing?
- Are enforcement agencies committed to the law?
- Can positive incentives be used?
- Do individuals have a reason to police compliance with the act?

Has the Commission considered whether, and to what extent, existing legal principles have improperly confined, directed, or limited their analysis:

- in the formulation of what qualifies as an issue?
- in proposing a solution that accords with existing precedent?

Have Commissioners examined how their own legal philosophies may have affected their conception of the problems, their formulation of the issues, and their recommendations?

Has "law" been seen as a terrain where people struggle over the meaning and quality of societal existence?

Has the Commission considered the opportunity to create new legal categories and to incorporate previously excluded perspectives into the legal system? Has the Commission considered different approaches to problems?

Have the Commissioners openly debated, fully articulated, and adequately explained their justifications for invoking a law-making power?

# Appendix 2. The Philosophical Foundations of Law<sup>179</sup>

The comments on the socially situated nature of law and its "reactive" and "constitutive" roles contained in the discussion on the social context of law on pages 100 to 102 express a particular philosophy of law. This analysis should, therefore, be placed in the context of other philosophical approaches to law so that Commissioners may determine their own — perhaps implicit and unconscious — philosophies of law. Fundamental philosophical questions about law cannot be avoided. It is probably best to acknowledge at the outset that many of us are reluctant philosophers!<sup>180</sup>

The four major jurisprudential strands of legal philosophy are: Natural Law, Legal Positivism, Legal Realism, and Artifactualism. This appendix highlights only the key components of each perspective, but vitally important debates go on within each. As jurisprudence has shifted from Naturalism, through Positivism and Realism to Artifactualism, there has been a "denaturalization" process whereby law is no longer seen as transcendental and autonomous of human activity. There is an increasing recognition that law is no more than a human construct, an artifact of human agency, contingent, located socially and historically and, therefore, capable of renovation. Consequently, those affected by and involved with law can no longer claim that law is part of the natural order beyond their control. Rather, this denaturalization process highlights the centrality of human action and the responsibilities that go along with such power.

#### The Natural Law Tradition

The Natural Law movement dates back at least 2 000 years to Greek philosophers and has been revised continually up to the present day. Whether it is Natural Law in its pagan rational forms (Greek and Roman), Christian divine forms (St. Augustine and Aquinas), or secularized, social contractarian, and rights-based forms (Hobbes and Locke), several key themes unite these otherwise diverse jurists. First, Natural Law claims to be universal, immutable, eternal, objective, and beyond any particularized political or historical context. Natural Law thinking is the quest for absolute values, justice, and truth. Under this theory, the validity of any law depends on its content, not just its form; there is an integral relationship between law and morality. Natural Law is said to be superior to human law and, therefore, has the justificatory and censorial power to determine if enacted laws are morally binding.

Beyond these themes, Natural Lawyers claim that their theory provides the best explanation for an obligation to obey the law. It provides both

moral and legal arguments because a law is valid only if it is in accordance with "right reason." Such law has an intrinsic value independent of the ends it achieves and it need not be justified according to its utility. Natural Law is portraved as the symbolic representation of Justice and thereby encourages us to pursue "the good." Natural Lawyers argue that law and justice can never be separated, because to do so will result in a legal formalism that can be conducive to, for example, Nazi laws.

A variety of criticisms have undercut the validity and vitality of Natural Law theory. First, it is argued that this theory is not as universal as it claims to be. Attention has been focussed on its mostly Catholic presuppositions. Natural Law theory has been accused of being an assertion of faith in a particular set of values rather than a demonstration of the truth of such values. Second, Natural Law is inherently ambiguous. No variation has ever provided a clear set of principles that could effectively guide enacted law. 181 A closely related third criticism is the malleability of Natural Law. At different times in different places it has played conservative, liberal, and even revolutionary roles. Natural Law is all things to all people depending on their own ideological bent. Fourth, there is no rational way to know objectively what is right and, therefore, Natural Law becomes even more relative, personal, and subjective. No amount of information about human nature provides proof that anything ought or ought not to be done as a consequence: you cannot derive an "ought" proposition from an "is." Finally, merging law with moral criteria causes confusion in our attempts to understand what law is.

# **Legal Positivism**

Positivism is both younger than and a reaction against Natural Law theory. Hints of Positivism can be identified in Hobbes, Locke, and Hume: but it was not until the writings of Bentham and Austin in the nineteenth century and those of H.L.A. Hart and Kelsen in the twentieth century that it has come into its own as a jurisprudential movement. Positivism provides an analytical approach that allows us to know what law "is." Consequently, it seeks to keep the question of "what law is" distinct from the question of "what law ought to be," proposing that no reference to "external" factors, such as justice or morality, should enter the definition of law. Positivism is driven by a quest for conceptual clarity and order and aspires to a scientific account of law. While few Positivists deny the importance of morality as an external criterion by which to assess any particular law, they nevertheless seek a temporary exclusion of morality so that law may be better understood.

After rejecting Natural Law's reliance on moralism, Positivists embraced empiricism: the belief that the essence of law could be discovered by empirical methodologies. This was an important breakthrough because it recognized that law is the product of human action and not merely the embodiment of some greater authority. Positivism saw law as essentially a system of rules and commands that generate habitual obedience. Although Positivism reoriented legal philosophy and made it focus on human agency, its scientific pretensions meant that it did not take human agency seriously enough. Positivism stressed the structural processes that it thought underpinned relations between people. It did not analyze the behaviour of the actual humans involved. This approach culminated in Kelsen's self-proclaimed "Pure Theory of Law," which sought to purge an analysis of law from what was seen as the contaminating elements of politics, ethics, sociology, history, and so on.

Positivism has had, and continues to have, a profound influence on legal thought in Canada. It is the philosophy used by those who argue that law is still relatively autonomous from other social forces such as politics, economics, gender, and race. These factors are rarely, if ever, factored into Positivistic inquiries of law. So, while human agency is acknowledged, no real attention is focussed on the consequences of such agency on law. This practice has generated some criticisms of Positivism. First, it is accused of creating an ideology in which the validity of a law becomes its own moral criterion (formalism), which leads to very unjust legal systems. Second, it is argued that Positivism's attempt to isolate law from its social, economic, and political context, to treat law as an object of scientific study, is an inappropriate extension of the methodologies of natural science. It is difficult to identify, let alone study, the institutions and the actors who make up the legal system without also considering their context and function.

### Legal Realism

Realism is a thoroughly modernistic phenomenon, surfacing in different forms in both Scandinavia and the United States in the early part of this century. American Realism was the product of a small group of progressive scholars and judges whose pragmatism drove them to reject the moralism of the Naturalists and the "arid conceptualism" of the Positivists. Oliver Wendell Holmes posited: "the life of the law has not been logic, but experience." Realism sought to factor in some of those very elements of human agency that Positivism strove to marginalize.

Realism sees law not as an object, but as a part of a larger system that is always in flux. Consequently, Realism tends to see law as a means to achieve some social end. It tends to adopt a functionalist approach that inquires into the purpose and effects of law. Realism, more so than Positivism, sees any analytical separation of "is" and "ought" as purely heuristic and admits that values unavoidably have an impact on legal rules. Realism is sceptical to the centrality of rules, positing that rules are much less determinative than Positivists assume and are frequently irrelevant to an explanation of what actually happens when legal decisions are made. Realism also casts doubt on the judicial rhetoric that claims that judging is politically neutral because judges are simply following the

rules. As a result, Realism encourages us to look behind the rules to see what the judges are actually doing as opposed to what they say they are doing. Specifically, Realists encourage us to inquire into the personalities. prejudices, political sympathies, economic preferences, idiosyncrasies, and other non-logical factors that have an impact on actors within the legal system. If this inquiry pursues what is actually happening in the legal system, then it will be necessary to draw on disciplines outside of law (sociology, economics, psychology, criminology, etc.) to help us better understand law. Finally, Realism suggests that there is a great deal more to law than simply looking at what the courts do. Law is part of a broader social system and has many dimensions beyond the judiciary.

The impact of Realism in the United States, but not so much in Canada, has been quite pervasive, so that many lawyers claim "we are all Realists now." First, Realism has inspired important research in the nonrule-governed aspects of our legal system such as the personal background of judges, the actual working of the jury system, the practical importance of the availability of legal representation, etc. Second, Realists have highlighted the indeterminacy of rules and their diminishing centrality within the legal system. Third, the interdisciplinary impulse generated by Realism demonstrates the necessarily contextual and located nature of law making, highlighting the importance of the actual individuals involved and their social complexity.

Realism has its detractors. Positivists claim that Realists underplay the importance of rules; Natural Lawyers accuse Realists of instrumentalist social engineering, devoid of any concept of "the good."

#### **Artifactualism**

As a theory of law, Artifactualism<sup>182</sup> builds upon the insights of Natural Law, Legal Positivism, and Realism, and at the same time criticizes them. Like Natural Law, Artifactualism recognizes that it is impossible to conceive of law without reference to the social values reflected in and enforced by law. However, according to Artifactualism, there is nothing separate or "out there" about law. What is universal, a priori, determinative, and transhistorical to Natural Law is contingent, historical, specific, and local to Artifactualists. Artifactualists join with Legal Positivists in emphasizing that law is a human construct and that the focus should be on the more tangible dimensions of law. However, Artifactualists critique Legal Positivists for focussing their quest on the essence of law, and for not pushing the agency analysis to its obvious conclusion and including what people do through law. In doing so, Positivists factor out just those aspects of human agency Artifactualists find to be of crucial significance, issues such as race, class, and gender.

Moreover, the Positivistic quest for the essence of law in one sense echoes the assumption of the Natural Lawyers that there is something called Law, with a capital L. Artifactualists reject this assumption and argue that all we have is a system of socially constructed and coercively enforced norms — laws — and these laws are in many ways ad hoc and contingent. In other words, Law, if the term is used at all, is only a shorthand way of describing an extremely complex matrix of social forces.

In these claims, Artifactualism builds upon the insights of Realism. However, Artifactualists criticize Realism as being too individualistic in its analysis and insufficiently sensitive to the constitutive dimension of law. Artifactualists agree with the Realists that we must not focus just on what judges say they do, but on what they do. But Artifactualists claim that Realists factor out certain structural commonalities of the judiciary, for example, their homogeneity in terms of class, race, and gender.

Artifactualism posits that law is best understood as the complex product of a host of interacting social forces. Our legal system reflects and condenses these politically significant forces in politically specific ways, while at the same time it helps entrench and enforce them as values. Artifactualists see laws as socially situated: both reactive to and constitutive of the broader society in which they operate. More specifically, Artifactualists emphasize that law is about power: not only is it a reflection of the power relations in our society, but it simultaneously constitutes those power relations. Power is seen as relational because it is negotiated, if unequally, between the different communities in a society. Law is not simply perceived as an instrument of the power elites of modern society — although it reflects and supports their interests to a significant degree — but, rather, it is a terrain of struggle over the meaning and quality of societal existence.

This very brief history of jurisprudential time indicates that the Commissioners' own implicit legal philosophies will necessarily have an impact upon their conception of the problems, the formulation of the issues, and the proposed recommendations. Artifactualism asks us to recognize that law is deeply embedded in and constitutive of the larger power dynamics of contemporary society; that law is about particular choices made by particular people in specific contexts; and that law can be used to reinforce disadvantage or to ameliorate it. Accepting the denaturalization of law may encourage responsible and engaged decision making because choices will be more informed, more sensitive to the needs of those who traditionally have been excluded from consideration, and more contextual.

# **Appendix 3. Summary of Legal Actors**

**Legislative Bodies:** The federal Parliament and provincial legislatures have direct and primary law-making power, allowing them to effect radical changes in the law quickly. Members of these bodies are elected officials who are politically accountable for their decisions. Their ability to legislate

is limited by the division of powers outlined in the Constitution and the rights and freedoms protected in the Charter.

**Recipients of Delegated Decision-Making Powers:** These include those to whom a grant of decision-making power has been made. Delegates sometimes receive the ability to make subordinate legislation.

**Governments:** This includes the executive, which directs policy, and the civil service, which is responsible for operationalizing it.

The Courts and the Judiciary: Courts are established under acts of either Parliament or the legislature; judges are appointed by either the federal or provincial governments. The Supreme Court of Canada is the final appellate court in Canada. Judges are said to interpret and apply law in the adversarial context of an actual dispute between interested parties. This involves the judiciary in a law-making process — especially in relation to constitutional issues where the courts may determine that the state has acted unlawfully. This in turn raises issues concerning the role, responsibilities, social composition, and responsiveness of judges.

**Law Reform Commissions:** These bodies take different forms in various provinces. Their main functions are to critique existing laws and recommend necessary changes.

**Law Societies:** These societies are the self-policing professional organizations to which all barristers and solicitors must belong before they can practise law within a particular jurisdiction. In theory, their primary duty is to protect the public interest in the administration of justice.

**Law Foundations:** Foundations are separate from the law society. They allocate funds for legal research, legal education, and law reform.

**Bar Associations:** These bodies exist primarily to meet the needs and interests of legal development. The Canadian Bar Association often submits briefs on the legal aspects of problems under study.

**Law-Related Interest Groups:** Many groups have been formed with the express or adopted purpose of effecting law reform.

# Notes

- 1. R. Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworths, 1984), 17.
- 2. These authors are mostly legal Positivists. See Appendix 2.
- 3. These authors tend to be what are referred to as "Artifactualists." See Appendix 2.
- 4. In most cases this interwoven web of law and society means that there can be no choice between whether one starts with the social problem or with its legal encapsulation, because they exist simultaneously and solutions must be pursued at the same time.
- 5. Appendix 2 deals with the philosophical foundations of law at greater length. Since willingness to seek and accept legal solutions is linked to a person's concept

- of law, fairness, and justice, a broader understanding of the different perspectives on these issues may help people realize their own suppositions and identify those of others.
- 6. An understanding of the social context of law also counsels against a strict adherence to some of the characteristics of legal method: those of carving up connected issues, objectifying situations and people, and using abstraction to remove them from their social surroundings.
- 7. See J.F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984). It may not be accidental that the Commission should receive its mandate at this particular historical moment.
- 8. It is difficult to say whether the changes we face are in any way greater or qualitatively different from the changes faced by those who lived before us, in what must have appeared, at least to them, to be uncertain and tumultuous times.
- 9. Law making will still be inevitable and necessary in a post-modern society. The Commission, therefore, has the unique opportunity to take the first tentative steps in formulating such an innovative exercise, and is seen to have already begun its active solicitation of public input.
- 10. G.L. Gall, The Canadian Legal System, 3d ed. (Toronto: Carswell, 1990), 1.
- 11. In fact, appointing this Commission implies a legal order that has undertaken a positive responsibility for the problems of society.
- 12. Gall, supra, note 10, 32-43. Subject matter divisions that are well recognized include the distinction between international law and domestic law. International law concerns the relationship between nations and domestic law concerns the law within a nation. The domestic law of Canada can be subdivided into two areas: substantive law and civil procedure. Civil procedure is the procedural mechanism by which substantive law is made operational, including the rules of the court, the law of criminal procedure, and the law of evidence. This paper will address the substantive aspects of law. Substantive law encompasses both public and private law. Public law addresses the interface between people and the state and includes constitutional, administrative, criminal, and taxation law. Private law is concerned with the legal relationships between individuals: such matters as contract, tort, family, and property law. In Canada there are two distinct types of private law systems: a civil law system in Quebec, and common law systems in the other provinces and territories. There is also a difference between civil law, in the sense of an action between private parties, and criminal law. It is, therefore, possible to speak of a civil action being taken in a common law jurisdiction.
- 13. In Canada there is no single constitutional document. See P.W. Hogg, Constitutional Law of Canada, 2d ed. (Toronto: Carswell, 1985), 2ff. Canada's overall constitutional arrangement is based on the British North America Act 1867, now renamed the Constitution Act, 1867, which establishes the rules for federalism, and the Canada Act 1982, a statute from the United Kingdom Parliament, which terminates its authority over Canada. Schedule B of the Canada Act 1982 was the Constitution Act, 1982, and it contains the Charter of Rights, the amending formula, and other changes to Canada's constitutional law. Section 52(2) of the Constitution Act, 1982 outlines what the "Constitution of Canada" includes and this draws in over 30 separate sources.

- 14. Other sources of law include the royal prerogative, custom and convention, juristic writings of notable scholars, and morality. In the absence of a specific legal source such as legislation or case law, or in the absence of an applicable custom or convention, a judge may determine what the law ought to be by recourse to the principles of morality. See Gall, *supra*, note 10, 41-43.
- 15. Canada Act 1982 (U.K.), 1982, c. 11.
- 16. Gall, supra, note 10, 38.
- 17. While these expressions do not have precise or generally accepted meaning, the term *regulation* is usually understood to be a subsidiary law of general application and is sometimes used to describe the whole instrument, and only a provision thereof. The term *order* "is usually regarded as a particular direction in a special case and is also used to describe the act or instrument that establishes rules or regulations." The expression *rule* is usually applied to procedural regulations. These three expressions are to some extent interchangeable. A law made by a municipal authority is usually called a *by-law* or an *ordinance*. See Gall, *supra*, note 10, 37.
- 18. M. Revillard, "Legal Aspects of Artificial Insemination and Embryo Transfer in French Domestic Law and Private International Law," in Ciba Foundation, *Law and Ethics of A.I.D. and Embryo Transfer*, Symposium No. 17 (Amsterdam: Elsevier, 1973), 77.
- 19. Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3. See ss. 96 and 100.
- 20. Ibid., sec. 101.
- 21. Hogg, supra, note 13. Sec. 92(14) of the Constitution Act, 1867, supra, note 19.
- 22. Section 33 of the Charter allows Parliament or a provincial legislature to override section 2 (fundamental justice), sections 7-14 (legal rights), and section 15 (equality rights) of the Charter. This override is effective for a period of five years and must be invoked again to remain in force. However, the courts decide if the use of the override provision is valid.
- 23. In Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: OLRC, 1991), 1. "Although judges had always, through their interpretation of law and the constitution, played a role in the development of public policy, the constitutional entrenchment of the Charter transformed the role from a penultimate to an authoritative one." This is especially true with respect to the Supreme Court of Canada.
- 24. Gall, supra, note 10, 137.
- 25. I. Grant and L. Smith, "Gender Representation in the Canadian Judiciary," in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: OLRC, 1991), 63.
- 26. J.J. Tait, "Reproductive Technology and the Rights of Disabled Persons," Canadian Journal of Women and the Law 1 (1986): 446-55.
- 27. A contrast is often drawn with certain American judges who are elected to their positions and must stand for public re-election on the basis of their performance and judicial record.

- 28. Sometimes the functions of agencies are more of a regulatory nature; but as recipients of delegated powers they are also legal actors.
- 29. Manitoba, The Law Reform Commission Act, S.M. 1989-90, c. 25, s. 6(d); Nova Scotia, The Law Reform Commission Act, S.N.S. 1990, c. 17, s. 4(a); Canada, Law Reform Commission Act, R.S.C. 1985, c. L-7, s. 11(d).
- 30. Law Reform Commission Act, supra, note 29.
- 31. Law Reform Commission Act, R.S.B.C. 1979, c. 225.
- 32. The Law Reform Commission Act, supra, note 29.
- 33. The Newfoundland Law Reform Commission Act, 1971, S.N. 1971, c. 38.
- 34. The Law Reform Commission Act, R.S.S. 1978, c. L-8.
- 35. The Law Reform Commission Act, supra, note 29.
- 36. Ontario Law Reform Commission Act, R.S.O. 1980, c. 343.
- 37. Although the Lieutenant Governor in Council in Nova Scotia must pay the salary of all commissioners, he or she is allowed to appoint only some of them. The primary institutional purpose of law reform commissions is to review the content of current law and to recommend reform.
- 38. The Institute was created pursuant to five-year renewable agreements between the Alberta government (Attorney General's department), the Law Society of Alberta, and the University of Alberta. The Institute is funded by the Alberta Law Foundation, the University of Alberta, and the Attorney General.
- 39. Ontario Law Reform Commission, Report on Human Artificial Reproduction and Related Matters (Toronto: Ontario Ministry of the Attorney General, 1985). In addition, in 1987-88 the vice-chairperson of the Ontario Law Reform Commission published a paper on human artificial insemination and IVF, and the research officers conducted research regarding surrogate motherhood and the legal aspects of infertility.
- 40. Law Reform Commission of Saskatchewan, *Proposals for a Human Artificial Insemination Act: Report to the Minister of Justice* (Saskatoon: LRCS, 1987). This proposal was sent to the Department of Justice in April of 1987 but has not been enacted to date.
- 41. British Columbia, Royal Commission on Family and Children's Law, Artificial Insemination, Report No. 9 (Vancouver: The Commission, 1975).
- 42. Legal Profession Act, S.B.C. 1987, c. 25; Legal Profession Act, R.S.Y.T. 1986, c. 100; Legal Profession Ordinance, O.N.W.T. 1976 (2d Sess.), c. 4; The Law Society Act, R.S.M. 1987, c. L-100; Legal Profession Act, S.A. 1990, c. L-9.1; The Law Society Act, 1977, S.N. 1977, c. 77; The Legal Profession Act, R.S.S. 1978, c. L-10; Law Society Act, S.N.B. 1973, c. 80; Barristers and Solicitors Act, R.S.N.S. 1989, c. 30; Law Society Act, R.S.O. 1980, c. 233; Law Society and Legal Profession Act, R.S.P.E.I. 1988, c. L-6; and An Act Respecting the Barreau du Quebec, R.S.Q. 1977, c. B-1. (In Quebec the conduct of notaries is governed by the Notarial Act, R.S.Q. 1977, c. N-2.)
- 43. Sec. 3(1)(1) of The Law Society Act, R.S.M. 1987, c. L-100 and sec. 6(f) of The Law Society Act 1977, S.N. 1977, c. 77 specifically authorize the society to

"subscribe, apply, or guarantee payment of, money for the advancement of legal education or research."

- 44. Only the Nova Scotia Act does not specifically mention legal research, education, and law reform.
- 45. The Law Societies of the Northwest Territories, New Brunswick, and Manitoba have never conducted any research regarding new reproductive technologies. Although specifically authorized to grant funds for research, the Law Foundations of Saskatchewan, the Yukon Territory, Nova Scotia, the Northwest Territories, Manitoba, New Brunswick, and Alberta have never funded research regarding new reproductive technologies. The other law societies and law foundations did not respond to our letters.
- 46. Canadian Bar Association, British Columbia Branch, Report of the Special Task Force Committee on Reproductive Technology (Vancouver: The Committee, 1989).
- 47. Certain interest groups have already presented to the Royal Commission, namely, women, alternative health, legal and human rights, family/religious/prolife, citizens, labour, culture, consumers of new reproductive technologies, disabled, and the medical community. Such groups are interested in, or affected by, the work of the Royal Commission.
- 48. The conditions under which laws are applied and enforced are discussed in "The Administration and Enforcement of Laws."
- 49. Mount Isa Mines Limited v. Pusey (1970), 125 Commonwealth Law Reports 383. J.-L. Baudouin et al., Toward a Canadian Advisory Council on Biomedical Ethics (Ottawa: Law Reform Commission of Canada, 1990), 1, explain that this relationship is to be expected. "This does not necessarily mean, however, that the law has inherent shortcomings or that it has inadvertently fallen behind. The role of law is not to regulate the minute details of the practice of medicine or of scientific activity. Its only function is to help define and structure medical services and, generally, to ensure that medicine is practised within the limits set by society."
- 50. Whether or not it recommends legal change, the Commission will help define what law is and ought to be.
- 51. The perspectives of other groups with a demonstrated interest in reproductive technologies, such as people with physical or mental disabilities, could also be included.
- 52. For a critique of the "maleness" of law, see C.A. MacKinnon, *Toward a Feminist Theory of State* (Cambridge: Harvard University Press, 1989); S.A.M. Gavigan, "Law, Gender and Ideology," in *Legal Theory Meets Legal Practice*, ed. A. Bayefsky (Edmonton: Academic Printing and Publishing, 1988); K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985); S. McLean and N. Burrows, eds., *The Legal Relevance of Gender: Some Aspects of Sex-Based Discrimination* (Atlantic Highlands: Humanities Press International, 1988); J. Rifkin, "Toward a Theory of Law and Patriarchy," *Harvard Women's Law Journal* 3 (1980): 83-95; D. Polan, "Toward a Theory of Law and Patriarchy," in *The Politics of Law: A Progressive Critique*, ed. D. Kairys (New York: Pantheon Books, 1983).
- 53. Such a model would break, rather than adopt or adapt, that of "family law" in the traditional sense.

- 54. Or the Commission could create new forms of public decision making and participation.
- 55. There is only an idea that systematic forces set in motion tend to produce characteristic outcomes.
- 56. There are no rules for when there should be a law or what type it should be. There is no defined test explaining when a law is needed; what the standard or burden of proof is; whether the test is harm-based; whether harm is personal, general, or societal; what qualifies as evidence of harm; or how the evil to be remedied should be defined.
- 57. See M.D.A. Freedman, ed., *Medicine, Ethics and the Law* (London: Stevens and Sons, 1988), 4.
- 58. Or, what does it mean to talk of a "natural" mother or "natural" father?
- 59. Cotterrell, *supra*, note 1, 6. See also C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989).
- 60. For example, the issue of great concern to early writers on reproductive technologies, of whether a married woman who underwent artificial insemination without her husband's consent committed adultery, grew out of a legal system that treated the wife's reproductive potential as within the husband's control.
- 61. J. McCalla Vickers, "Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research," in *Feminism in Canada: From Pressure to Politics*, ed. A. Miles and G. Finn (Montreal: Black Rose Books, 1982).
- 62. For example, a holistic approach to women's reproductive health would include a consideration of imposed use of dangerous birth control devices; sterilization abuse; inaccessibility of abortion; forced hysterectomy; exposure to reproductive hazards in the workplace; the availability of prenatal care and accurate information about sex, conception, and contraception; access to safe, affordable abortion; protection from environmental and occupational hazards; sterilization abuse; and pharmaceutical experimentation.
- 63. See P.A. Martin and M.L. Lagood, "The Human Preembryo, the Progenitors and the State: Toward a Dynamic Theory of States, Rights and Research Policy," *High Technology Law Journal* 5 (1990): 257-310.
- 64. For an overview see B.M. Knoppers, *Human Dignity and Genetic Heritage* (Ottawa: Law Reform Commission of Canada, 1991).
- 65. In some cases, the same conclusion can be justified on either rationale; when the Warnock Report recommended that, as a matter of good practice, no research should be carried out on a spare embryo without the informed consent of the couple who generated it, was the parental or property model in operation?
- 66. C. Tauer, "Essential Ethical Considerations for Public Policy on Assisted Reproduction," in *Beyond Baby M: Ethical Issues in New Reproductive Techniques*, ed. D.M. Bartels et al. (Clifton: Humana Press, 1990), 65-67. Respect for the person may require that competent persons are permitted to act on autonomous choices and that all people are respected as ends in themselves and not as some form of means to a desired reproduction-related outcome. The principle of well-being requires that we promote the welfare of others and protect people from risks of harm. Equality requires that we treat people fairly and without discrimination in relation to social benefits and burdens.

- 67. Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927.
- 68. Constitution Act, 1867, supra, note 19.
- 69. Hogg, supra, note 13, 405.
- 70. Schneider v. The Queen, [1982] 2 S.C.R. 112; R. v. Wetmore, [1983] 2 S.C.R. 284; Labatt Breweries of Canada Ltd. v. Attorney General of Canada. [1980] 1 S.C.R.
- 914; R. v. Hauser, [1979] 1 S.C.R. 984.
- 71. R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401.
- 72. D. Gibson, "Measuring 'National Dimensions," Manttoba Law Journal 7 (1976): 15-37. See also Canada, Shaping Canada's Future Together: Proposals (Ottawa: Minister of Supply and Services Canada, 1991) for the current constitutional proposals. There is the suggestion that the federal residual power over national emergencies and national dimensions will be maintained but that all other matters not specifically assigned to the federal government will be relinquished to the provinces. While there is no direct devolution of whatever federal health powers may exist because the national dimensions strand of the peace, order, and good government clause is reserved, there may be a consequential narrowing of this jurisdiction.
- 73. Food and Drugs Act, R.S.C. 1970, c. F-27.
- 74. In the current proposals for constitutional reform there is the claim that "the Government of Canada commits itself not to introduce new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction without the approval of at least seven provinces representing 50 percent of the population. This provision would be entrenched in the Constitution. The constitutional amendment would also provide for reasonable compensation to provinces that choose not to participate in the new Canada-wide programs but which establish their own programs meeting the objectives of the new program" (Shaping Canada's Future, supra, note 72, 40-41). This proposal, however, is silent on the constitutional fate of existing cost-shared programs, such as medicine.
- 75. Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, R.S.C. 1985, c. F-8.
- 76. Constitution Act, 1867, *supra*, note 19, s. 92(7). The Territories are granted identical authority under the Yukon Act, R.S.C. 1985, c. Y-2, s. 17(h)(q) and the Northwest Territories Act, R.S.C. 1985, c. N-27, s. 16(h)(q).
- 77. In some provinces, certain procedures are outside the publicly funded health care system. Limiting funding, rather than withholding it entirely, also may have an adverse effect on the availability of reproductive technologies. Rules concerning the tariff of medical fees may discourage doctors from performing certain types of procedures or providing certain types of services. Funding controls also take the form of a stipulation that public funds are available only for procedures performed in an approved hospital or licensed facility.
- 78. For example, is something a medical technology such that it properly is a matter of health? What makes something a medical matter? Can it merely be that if it is a service offered by those who practise medicine or that it is offered in a hospital setting, or that is has some medical implications? How should the following be classified: artificial insemination donor selection and screening; sperm testing and storage; medical and possibly psychological assessment of the recipient;

matching of the donor and the recipient's partner to approximate the characteristics of the social father; treatment of the recipient to regulate ovulation; and the determination of the recipient's menstrual cycle?

- 79. Provinces can only create summary conviction offences. See, generally, Starr v. Houlden, [1990] 1 S.C.R. 1366.
- 80. Reference Re Freedom of Informed Choice (Abortions) Act (1986), 25 D.L.R. (4th) 751 (Sask. C.A.). Even if division-of-power concerns were not determinative, such restrictions could be challenged under the Charter.
- 81. R. v. Morgentaler (1991), 83 D.L.R. (4th) 8 (N.S.C.A.). Leave to appeal was granted by the Supreme Court of Canada.
- 82. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 24, 52.
- 83. For a discussion of the concept in the American context, see R.C. Wood, ed., Remedial Law: When Courts Become Administrators (Amherst: University of Massachusetts Press, 1990).
- 84. For example, if the decision of the Supreme Court of Canada in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 is read as the limit of the Charter's section 7 protection in relation to abortion (a dubious assumption but it may illustrate the point), then at a minimum the federal government could not enact criminal prohibitions on abortion that improperly denied the woman's priorities and aspirations. The government could, however, choose to go further in its legislation and confer on women the legal ability to have timely access to publicly funded abortions. In this way, legislation may grant legal abilities beyond the content of recognized Charter rights. It is important to remember that because the development of the content of Charter rights is in its initial stages, it may be difficult to determine when pure compliance with the Charter becomes the further promotion of Charter interests.
- 85. The widespread jurisprudential acceptance that individual rights vest at birth, the combination of dicta in Morgentaler, and the reasoning in Tremblau v. Datale, [1989] 2 S.C.R. 530 suggest a judicial preference for treating the legal status of the fetus as a question of a public "interest" rather than granting separate and independent Charter "rights" to the fetus. In Morgentaler, the majority stated that Parliament has a legitimate interest in the protection of fetal life, but they did not comment on when it arises or how far it extends: R. v. Morgentaler, [1988] 1 S.C.R. 30 at 122 per Beetz J.; at 181 per Wilson J. At 75 Chief Justice Dickson classifies the state interest as the balancing of fetal interests with the lives and health of women. In a per curiam unanimous judgment in Tremblay v. Daigle, the Supreme Court held that the right to life conferred on "human beings" under the Quebec Charter of Human Rights and Freedoms was not intended to include a fetus. The Court affirmed that legal rights vest only at birth, under the civil law, which was directly in issue, and under the common law of other provinces, which was not. Since the Supreme Court has stated that the Quebec Charter and the Canadian Charter should be construed in a similar fashion, Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, it is unlikely that the term "everyone" in section 7 under the Charter will be interpreted to include a fetus. The normative contents of the questions under each document are virtually identical and it would be extremely

difficult for the Supreme Court to justify a different answer under the Canadian Charter than the one given under the Quebec Charter.

- 86. In Borowski v. Canada (Attorney-General) (1983) 4 D.L.R. (4th) 112, [1984] 1 W.W.R. 15, 8 C.C.C. (3d) 392 (Sask. Q.B.); affirmed (1987) 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402 (Sask. C.A.); affirmed [1989] 1 S.C.R. 342. Both courts held that constitutional rights vest at the time of birth, not conception. Mr. Justice Gerwing, writing for the unanimous Court of Appeal, held that a fetus was not a "fully capacitated person" able to enjoy the protections contained in the Charter. He said, "I must thus conclude that the historic treatment of the fetus at Anglo-Canadian law has not been as a person or part of 'Everyone' and that, if such status were now to be accorded, it would be novel." Birth has always been seen as the identifiable time when the physical individuation of the child from its mother makes relational and social concepts, like legal or constitutional rights, meaningful. If a fetus had separate constitutional rights exercisable against the state, the Court would be called upon to balance two complete and competing sets of constitutional rights within one body (that of the pregnant woman), and address the thorny issue of who can speak for the fetus. The prospect of a court being called upon to balance two full sets of constitutional rights within the one body of the pregnant woman or to delineate who can speak for the fetus may reaffirm its commitment to the socalled "born alive" rule for the vesting of rights. By allowing a parliamentary interest in the protection of fetal life, the Court may follow the accepted Charter paradigm under which the state interest asserted by way of government action (the protection of fetal life) must not unreasonably and unjustifiably infringe recognized constitutional rights (the Charter rights of Canadian women).
- 87. In R. v. Big M Drug Mart Ltd. et al., [1985] 1 S.C.R. 295 at 333-34, the Supreme Court said that it is certain that the Canadian Charter of Rights and Freedoms does not simply recognize and declare rights as they were circumscribed by legislation current at the time of the Charter's entrenchment. The language of the Charter is imperative. It avoids a reference to existing or continuing rights.
- 88. Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 at 394.
- 89. Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145.
- 90. The Charter may control indirectly, because human rights legislation is law and as such these laws must respect Charter rights.
- 91. Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483. The Supreme Court of Canada held that the hospital's provision of a public service, even one as important as health care, does not qualify as a government function per se.
- 92. See Individual's Rights Protection Act, R.S.A. 1980, c. I-2, s. 3; Human Rights Act, R.S.N.S. 1989, c. 214, s. 4; Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 2; Human Rights Act, R.S.N.B. 1973, c. H-11, s. 5; Human Rights Code, 1981, S.O. 1981, c. 53, s. 1; The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 12; Human Rights Act, S.B.C. 1984, c. 22, s. 3; *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 12; Human Rights Act, S.Y.T. 1987, c. 3, s. 8; The Human Rights Code, S.M. 1987-88, c. 45, s. 13. The Northwest Territories does not have a Human Rights Act. They refer matters to the "Fair Practices Officer" of the Department of Justice.
- 93. Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712.

- 94. Many theories of equality have had difficulty accommodating the different biological capacities of men and women. See C.A. MacKinnon, "Difference and Dominance: On Sex Discrimination," in *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), and C.A. MacKinnon, "Making Sex Equality Real," in *Righting the Balance: Canada's New Equality Rights*, ed. L. Smith et al. (Saskatoon: Canadian Human Rights Reporter, 1986).
- 95. Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 171.
- 96. R. v. Morgentaler, [1988] 1 S.C.R. 30.
- 97. Tremblay v. Datgle, [1989] 2 S.C.R. 530.
- 98. Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219.
- 99. E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388.
- 100. J.G. Raymond, "Reproductive Gifts and Gift Giving: The Altruistic Woman," Hastings Center Report 20 (June 1990), 7.
- 101. P. Spallone, "The Warnock Report: The Politics of Reproductive Technology," Women's Studies International Forum 9 (1986), 544.
- 102. See B.K. Rothman, "Recreating Motherhood: Ideology and Technology in American Society," in Beyond Baby M: Ethical Issues in New Reproductive Techniques, ed. D.M. Bartels et al. (Clifton: Humana Press, 1990). Rothman explains that most of our concepts around parenthood, even motherhood, have been defined by males. She explains how the initial focus and primary conceptualism were on the male seed as the source of being: a system of paternity that grew out of patriarchy. When woman's contribution to the physical processes of human reproduction became known, it did not alter the manner in which the relationship was defined. She claims, "When the significance of women's seed is acknowledged in her relationship with her children, women too come to have paternity rights in their children. In this modified system based on the older ideology of patriarchy, women too can be seen to own their children, just as men do. This relationship between women and their children is not based on motherhood per se, not on the unique nurturance, the long months of pregnancy, the intimate connections with the baby as it grows and moves inside her body ... Instead, women are said to own their babies and have 'rights' to them, just as men do: based on their seed" (ibid., 9, 11).
- 103. Canada Health Act, S.C. 1984, c. 6.
- 104. Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, *supra*, note 75. A recent decision of the Supreme Court of Canada held that it was lawful for the federal government to unilaterally terminate its payments under the cost-shared funding arrangement for welfare. See *Reference Re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60.
- 105. For an overview of how the act operates, its limited utility to private complaints, and its potential if joined with the Charter, see S. Martin, Women's Reproductive Health, the Canadian Charter of Rights and Freedoms and the Canada Health Act (Ottawa: Canadian Advisory Council on the Status of Women, 1989).
- 106. When a provincial decision contravenes the criteria in the Canada Health Act, the province may be acting illegally. It is important to remember that because provinces have jurisdiction over health matters, they may either accept or reject the

federal funds and the federal stipulations outlined in the Canada Health Act. Therefore, there would be no cause of action if the province chose not to insure certain medically necessary services and received less federal money as a result. However, there may be cause for complaint where a province is claiming and receiving full federal contribution at a time when it is contravening the act's criteria.

107. The relationship between international instruments and domestic law is complex. See H.M. Kindred et al., *International Law*, *Chiefly as Interpreted and Applied in Canada*, 4th ed. (Toronto: Emond Montgomery, 1987), especially 635ff. on human rights.

108. This does not place Canada in breach of its international obligations as long as it respects the standards of the Covenants. See J. Humphrey, "The Canadian Charter of Rights and Freedoms and International Law," Saskatchewan Law Review 50 (1985-86): 13-19. He argues that Canada has not been quick to adopt international obligations and standards.

109. U.N. General Assembly resolution 2200 A (XXI), 16 December 1966. In force for Canada: 19 August 1976.

110. U.N. General Assembly resolution 2200 A (XXI), 16 December 1966. In force for Canada: 19 August 1976.

111. U.N. General Assembly resolution 2200 A (XXI), 16 December 1966. In force for Canada: 19 August 1976. Under this protocol, citizens may initiate individual complaints.

112. U.N. General Assembly resolution 34/180, 18 December 1979. In force for Canada: 10 January 1982. See section 12; it reads:

- 1. States Parties shall take all appropriate measure to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
- 2. Notwithstanding the provisions of paragraph 1 above, States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.
- 113. The American Declaration of the Rights and Duties of Man was adopted by the 9th International Conference of American States held in Bogota in 1948. Some argue that the absence of express implementation for these documents in Canada means that they do not impose binding obligations. It has, however, been argued that the Charter is the implementing device for these documents so that these international obligations would have a greater relevance and impact. See M. Cohen and A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law," Canadian Bar Review 61 (1983), 265-68.
- 114. M.A. Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications," *University of Western Ontario Law Review* 23 (1985), 9-10.
- 115. R. v. Oakes, [1986] 1 S.C.R. 103 at 120.
- 116. Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 at 349. Hayward, supra, note 114. He comments that frequently in lower courts, international sources are listed, but are not used in the analysis.

- 117. See E.P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights," *Alberta Law Review* 20 (1982): 383-433. B.M. Knoppers, "Reproductive Technology and International Mechanisms of Protection of the Human Person," *McGill Law Journal* 32 (1986-87): 336-58.
- 118. Law Reform Commission of Canada, *Policy Implementation*, *Compliance and Administrative Law* (Ottawa: Law Reform Commission of Canada, 1986), 36.
- 119. Law Reform Commission of Canada, Our Criminal Law: Report (Ottawa: Information Canada, 1976), 33-34.
- 120. Law Reform Commission of Canada, *Crimes Against the Foetus* (Ottawa: Law Reform Commission of Canada, 1990).
- 121. National Association of Women and the Law, A Response to Crimes Against the Foetus, the Law Reform Commission of Canada's Working Paper 58 (Ottawa: National Association of Women and the Law, 1989).
- 122. Law Reform Commission, supra, note 119, 8.
- 123. M.J. Trebilcock et al., *The Choice of Governing Instrument* (Ottawa: Economic Council of Canada, 1982), 93.
- 124. Criminal Code, R.S.C. 1985, c. 46 as am.: section 223 prenatal injuries causing death; section 233 infanticide; section 238 killing an unborn child in the process of being born; section 242 neglect to obtain assistance in childbirth; section 243 concealing the body of a child; and section 288 supplying noxious things for the purpose of procuring miscarriage.
- 125. This type of criminal prohibition resembles the proposal to define only commercial surrogacy as a crime.
- 126. The prohibition was subject to a public good defence where there would be no criminal liability if the accused's actions were in the public interest. The public good defence meant that criminality was determined according to the social context of the conduct and not because of its inherent vices.
- 127. Legalization of abortion in the United States was accompanied by a sharp decline in abortion-related deaths. This is attributed to the drop in illegal abortion deaths. W. Cates, Jr. and R.W. Rochat, "Illegal Abortions in the United States, 1972-1974," Family Planning Perspectives 8 (1976): 86-88, 91-92.
- 128. R.J. Cook and B.M. Dickens, Abortion Laws in Commonwealth Countries (Geneva: World Health Organization, 1979); J.L. Jacobson, *The Global Politics of Abortion* (Washington, DC: Worldwatch Institute, 1990).
- 129. The choice here is between less serious summary conviction offences and the more serious indictable offences.
- 130. Extracted from Royal Commission on New Reproductive Technologies, "Analysis of Public Hearings: National Overview"; "Analysis of Public Hearings: Annex to the National Overview"; and "Analysis of Public Hearings: Summary and Analysis of Media Coverage, May-December 1990" (Ottawa).
- 131. B.M. Knoppers and E. Sloss, "Recent Developments: Legislative Reforms in Reproductive Technology," Ottawa Law Review 18 (1986), 701-703.
- 132. Surrogacy Arrangements Act 1985 (U.K.), 1985, c. 49.

- 133. The Human Fertilisation and Embryology Act 1990 (U.K.), 1990, c. 37.
- 134. The purpose of this example is not to advocate for the suggested controls, but to establish the potential range of regulatory options. For a general discussion of disclosure see B.M. Dickens, "Reproduction Law and Medical Consent," *University of Toronto Law Journal* 35 (1985): 255-86.
- 135. See, generally, M.A. Somerville, Consent to Medical Care: A Study Paper (Ottawa: Law Reform Commission of Canada, 1979).
- 136. Regulatory statutes often create offences for breach. Typically, these offences are not rooted in the criminal law concepts of *mens rea*, blameworthiness, or punishment. As a result, they tend to carry less stigma. They are usually subject to a defence that the accused took reasonable measures and exercised due diligence. Offences usually involve fines. While imprisonment is not impossible, it is rare. Provinces can establish regulatory offences but they cannot improperly invade Parliament's exclusive jurisdiction over criminal law. Similarly, the federal government may not have jurisdiction to sustain a regulatory system that relies on more sophisticated tools than a simple criminal prohibition and penalty. Most regulatory offences are judicially imposed in the sense that an administrator or private person might initiate a prosecution, but the court determines whether the offence has been committed and the sentence. Alternatively, regulatory offences can be imposed administratively.
- 137. This type of practice may offend the principle of patient autonomy and may run afoul of the Canadian Charter of Rights and Freedoms.
- 138. Black's Law Dictionary, 5th ed. (St. Paul: West Publishing, 1979), 829.
- 139. G. Williams, "Control by Licensing," Current Legal Problems 20 (1967): 81-103.
- 140. H. Street, Justice in the Welfare State, 2d ed. (London: Stevens and Sons, 1975).
- 141. Alternative approaches, such as licensing rather than criminal prohibitions, have been advocated in the area of pollution control. Comments that the courts have problems grappling with the scientific, technically imprecise, and value-laden nature of pollution activity and the ongoing nature of pollution control would seem equally applicable to the complexities of reproductive technologies. See K.R. Webb, *Pollution Control in Canada: The Regulatory Approach in the 1980s* (Ottawa: Law Reform Commission of Canada, 1988).
- 142. Street, supra, note 140, 79.
- 143. Williams, *supra*, note 139. Licensing schemes can be used to control conduct or for some other purpose, such as economic control, or dealing with public proprietary rights for profit or conservation purposes.
- 144. M. Warnock, A Question of Life: The Warnock Report on Human Fertilisation and Embryology (Oxford: Basil Blackwell, 1985), 75. The body or board recommended was to be very powerful. The Commissioners recognized that none of their recommendations could have any practical effect without the establishment of this body. This body was subsequently established.
- 145. Ibid. They decided that no extra training was needed to obtain the necessary licence.

146. Williams, supra, note 139.

147. See D.B. Hogan, "The Effectiveness of Licensing: History, Evidence and Recommendations," Law and Human Behavior 7 (1983): 117-38. Professional licensing is often delegated to members of the profession so that it becomes self-regulating. This author claims that since the purpose of such regulation is to ensure professional competency in practice, the establishment of strict entry requirements unrelated to competency and the failure of such bodies to effectively discipline licensees for incompetence are counter-productive to the objective of professional licensing. Further, these restrictive entry requirements have the negative effect of increasing costs of services, creating artificial shortages of professional practitioners, and appearing to serve the self-interests of the profession by establishing a monopoly rather than ensuring the public welfare objective of high professional competence. This form of exclusive control by the profession also results in impediments to needed reforms in service delivery such as the innovative use of paraprofessionals.

148. Street, supra, note 140, 83-84.

149. Williams, supra, note 139, 89.

150. Ibid., 91.

151. Street, supra, note 140, 91-92.

152. There are, however, other ways in which decision making can be vested in someone without a direct, formal, and legally based grant of power. A good example is self-regulation by an industry. Remaining silent on an issue or failing to expressly confer decision-making ability on a state actor may tacitly vest it in another body.

153. E.L. Rubin, "Law and Legislation in the Administrative State," *Columbia Law Review* 89 (1989), 369-89.

154. D.P. Jones and A.S. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 1985), 4.

155. Ibid., 4-5.

156. An interesting critique of current legislation is that it reflects a narrow view of legislation as rule making, which we can recognize as law. It is argued that rules may not constitute the most effective legislation, especially if legislation is viewed primarily as directives issued to implementation devices. One author suggests that legislatures should feel free to enact a goal as law and direct the implementing mechanism to achieve that end. Even though this is not law in a traditional form, he believes it may better suit what he believes is the ultimate goal of legislation: effective and efficient policy making. He also contends that the legislature could enact not only a rule, but the administrative structure for implementing that rule. See Rubin, *supra*, note 153.

157. The mandatory nature of such a duty may operate to remove important elements of the decision "making" process.

158. Jones and de Villars, supra, note 154, 50.

159. Law Reform Commission of Canada, *Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1985), 5.

- 160. Baudouin, *supra*, note 49. The goal of such a council would be to have coordination and consistency between the country's scientific and ethical activities. The Commission, on page 5, reports that it is impossible to establish with any certainty how many ethics committees exist in Canadian hospitals and how they work, whether their focus is clinical or research. They call for a systematic approach to these bio-ethical questions and the development of overall policies.
- 161. Law Reform Commission, supra, note 159, 9.
- 162. Private law rules can, however, be manipulated to reach public ends. A 1975 abortion law in the State of Illinois provided that anyone who created an embryo would be legally responsible for it. The allocation of a private legal duty on those who did not want it resulted in doctors deciding not to do this research.
- 163. For a general overview see J. Bercovitch, "Civil Law Regulation of Reproductive Technologies: New Laws for the New Biology?" Canadian Journal of Women and the Law 1 (1986): 385-406.
- 164. See B.M. Dickens, *Medico-Legal Aspects of Family Law* (Toronto: Butterworths, 1979).
- 165. For many years the law recognized the division between biological and social parents in the form of adoption. What is unique about reproductive technologies is that they allow a division between the biological functions of motherhood into the genetic and the gestational.
- 166. Now when the law ties obligations to a genetic link it is not relevant that a man agrees to accept his responsibility to pay child support, he is obligated regardless. In any revision, this principle could be maintained when there is a genetic link, but when there is not, another principle could be fashioned to allow a person to assume voluntarily parental obligations. Whether assumed obligations are unilaterally terminated should be considered because this possibility does not arise in relation to biology; a genetic link continues as an immutable fact, but the giving of consent can be seen as an ongoing process.
- 167. See also M.J. Trebilcock and R. Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective," *University of Toronto Law Journal* 41 (1991): 533-90.
- 168. Care must be taken not to allow property law considerations to improperly determine matters. For example, the Warnock Commission was concerned that widows using stored semen may upset inheritances, but these sorts of property considerations should not drive the analysis.
- 169. See Wetss v. Solomon (1989), 48 C.C.L.T. 280 (Que. S.C.), and Halushka v. University of Saskatchewan (1965), 52 W.W.R. 608 (Sask. C.A.).
- 170. See B.M. Dickens, "Wrongful Birth and Life, Wrongful Death Before Birth, and Wrongful Law," in *Legal Issues in Human Reproduction*, ed. S. McLean (Aldershot: Gower, 1989), 80.
- 171. M. Eichler, "Preconception Contracts for the Production of Children What Are the Proper Legal Responses?" in *Sortir la maternité du laboratoire: actes du Forum international sur les nouvelles technologies de la reproduction* (Quebec: Conseil du statut de la femme, 1988), 187-89. Eichler explains how an assessment

of the import of preconception contracts requires a review and clarification of the following factors:

- Who are the contractual parties?
- What is their relationship to each other?
- · What is the fertilization technique employed?
- What are the genetic and social parenthood relationships seen from the perspective of the child that is produced?
- Is there any involvement by a middle person or agency?
- What is the social or legal context?
- · What, if any, commercial aspects are there?

172. For an overview of different issues relating to reproductive technologies see G. Corea, The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs (New York: Harper and Row, 1985).

173. In Re Baby M, 537 A. 2d 1227 (N.J. 1988), rev'g 525 A. 2d 1128.

174. W.M. Evan, "Law as an Instrument of Social Change," in *The Sociology of Law: A Social-Structural Perspective*, ed. W.M. Evan (New York: Free Press, 1980). Evan writes in light of American race relations law and lists seven conditions that provide a framework for analysis as to the effectiveness of legislation.

175. Cotterrell, supra, note 1, 64.

176. In this context it is interesting to note the institutionalized division of labour between enforcement agencies and the courts. Enforcement agencies may be of many different kinds and may have different types of commitments depending on the external sources of their authority, their internal organization and resources, the nature of their enforcement task, and the environment in which the task is to be accomplished.

177. The kind of sanctions used in the law may have a vital bearing on its capacity to influence attitudes. Legal coercion, for example, may force a change of behaviour, but where there is no sense of choice, a person acting in external conformity with the law may not be driven to change attitudes that are at odds with the law. Some suggest that a precondition of positive attitude change is a sense of volition; if people are induced, not compelled, to act in a certain way they will search for information to support their new commitment.

178. For example, through the setting of minimum damages recoverable in litigation even though the loss was in fact less; or the legislation may provide punitive damages, double or treble damages, or recovery of legal fees. Modern law uses a wide variety of incentives to secure the effectiveness of the legislation. R.S. Summers, "The Technique Element in Law," *California Law Review* 59 (1971): 733-51.

179. This section on the Philosophical Foundations of Law was written by Professor Richard Devlin, the editor of *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991).

180. See M. Warnock, "Moral Thinking and Government Policy: The Warnock Committee on Human Embryology," *Milbank Memorial Fund Quarterly: Health and Society* 63 (1985), 505-506. "There was no one on the Committee who doubted that

we were concerned with moral questions, in some profound and inescapable sense of the term (though at the beginning some members, especially those who were also members of the medical profession, were very dubious about expressing *moral* opinions, wishing to confine themselves to something they thought of as rather different, namely professional ethics)."

181. Because of its refusal to consider the actuality of historical, empirical, scientific, anthropological, and other factors, it is said by critics to be much too general, abstract, and vague to offer any really practicable legal solutions in the face of any detailed and definite set of facts.

182. This term is coined by the author (Richard Devlin) in order to provide a label for a variety of recent approaches to law, which, though diverse in many respects, share some common assumptions and aspirations.

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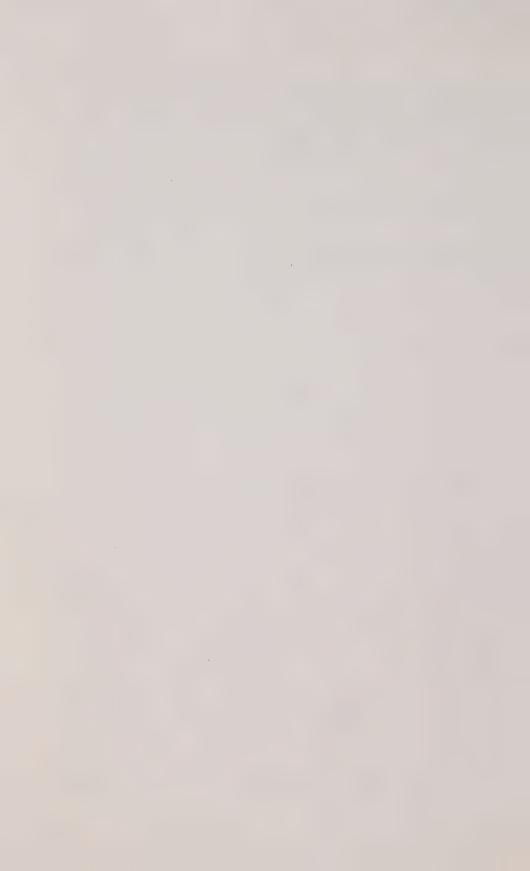
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# Overview of Canadian Laws Relating to Privacy and Confidentiality in the Medical Context

Eugene Leon Oscapella



#### **Executive Summary**

This report surveys the legal, ethical, and professional obligations relating to the protection of privacy — particularly privacy of information — in Canada. Privacy of information involves the collection, use, and disclosure by others of personal information; the report focusses on confidentiality as a vehicle for protecting this information.

The law governing privacy and confidentiality is vast, complex, and sometimes confusing. The report attempts to identify a hierarchy of authorities to help in identifying which laws apply to which situations, especially in cases where two or more laws or other obligations conflict.

The report goes on to summarize several sources of legal obligations for establishing and protecting privacy rights: international law, Canadian constitutional law, federal and provincial data protection legislation, other federal and provincial legislation touching on privacy and confidentiality, common law rules on privacy and confidentiality, codes of professional conduct, and ethics and guidelines.

Detailed examples of federal and provincial legislation governing data protection, confidentiality, obligations to disclose confidential information, and mandatory reporting requirements are contained in the appendices.

# Part 1. Introduction

Canadian laws regulating privacy weave a complex, yet incomplete, web. No single body of law regulates or protects against privacy intrusions by governments and others. Privacy is regulated instead by a combination of international law and codes, constitutional documents, federal and provincial legislation, the common law (judge-made law, or law that has not been created by enacting a statute), professional codes, ethics, and guidelines.

This report examines the major legal authorities regulating the collection, use, and disclosure by others of information about a person (*personal information*). Collection, use, and disclosure are the actions that directly affect a person's control of his or her personal information. The report deals in particular with one vehicle for protecting that information, namely, confidentiality.

The law on privacy and confidentiality is vast. It emanates from so many sources that significant additional analysis would be required to cover it in detail. This report therefore should serve simply to survey and highlight the main sources of law and their principal tenets.

Because there are so many overlapping laws governing privacy and confidentiality, conflicts among those laws are inevitable. The reader will likely become confused about which law might apply to a given situation. While it is impossible to be both categorical and completely correct, Part 2 attempts to identify a rudimentary hierarchy of legal and other obligations relating to privacy and confidentiality.

The terms *privacy* and *confidentiality* are commonly used loosely and interchangeably; for example, one might speak of the details of one's personal life as either private or confidential. Yet, as the following section illustrates, the legal notions of privacy and confidentiality are distinct.

# **Privacy**

Privacy has been described, perhaps inadequately, as "the right to be left alone." The concept defies simple definition. One Canadian authority notes:

Many attempts have been made by individual writers, law reform bodies, and international organizations, to state with precision and clarity just what is intended by these ideas [privacy or "the right to privacy"]. Despite such efforts, there is still uncertainty about the scope of privacy.<sup>2</sup>

This uncertainty in part stems from the use of privacy to describe any of a series of rights (or interests):

• the right to protection against physical intrusions against the person, such as assaults, or physical searches by police;

- the right to protection from intrusions against property, such as a search of one's home;
- the right to protection from surveillance, such as by cameras or eavesdropping devices or, perhaps, researchers;
- the right of a person not to have his or her personality appropriated, such as through the use of a person's picture for advertising without the person's consent; and
- the right to control of information about oneself.<sup>3</sup>

The right to control of information about oneself is clearly the main aspect of privacy relevant to the work of the Royal Commission on New Reproductive Technologies. For example, this right may regulate the handling of information about the identity of sperm donors or those born of new reproductive technologies. In this report, this aspect of privacy is called *privacy of information*. To a lesser extent, the right to freedom from privacy intrusions through surveillance by researchers might also be relevant to the Commission. However, the concept of privacy of information is likely broad enough to encompass this type of surveillance, since the ultimate goal of research surveillance is to obtain information.

The report does not deal extensively with the other aspects of privacy—freedom from physical intrusions against the person<sup>4</sup> and property, and freedom from appropriation of personality.

Privacy rights are not absolute. The police must sometimes intrude on physical privacy to suppress crime. Governments must collect personal information about their citizens to govern. Others — banks, credit agencies, researchers — also require personal information. The essence of effective privacy protection lies in ensuring that these violations are kept to the minimum necessary in a democratic society.

Clearly, views will differ about what constitutes an acceptable level of privacy. Some might argue that the public interest in medical research justifies generally unrestricted access by researchers to records containing personal information. Others may feel that patients should not have to have their privacy diminished beyond having to disclose personal information to the person treating them. The issue at the foundation of most discussions of privacy is whether the public interest or some other social good justifies diminishing one's personal privacy.

There are several ways to protect the privacy of personal information. The most obvious is to restrict or prevent its collection in the first place. As an extreme example, a law could dictate that the identity of non-spousal sperm donors not be recorded — only the donor would know he was the donor.

A second way is to restrict the use made of personal information that has been collected. For example, a law might limit governments to using the information for the purpose for which it has been collected or for a use consistent with that purpose.

A third way is to impose obligations of confidentiality to prevent unwarranted disclosure of the information collected.<sup>5</sup>

# Confidentiality

Confidentiality is an obligation owed by one person not to disclose information given by or about another, or to disclose it only in limited circumstances. In government, the obligation of confidentiality may relate to state secrets. In both government and the private sector, the obligation may relate to personal information.

Confidentiality is one means to prevent the excessive disclosure of personal information that others have collected. It is thus a tool for protecting privacy of information. The greater the limits placed on disclosure of personal information (the stricter the obligation of confidential-

ity), the more effectively confidentiality protects privacy.

Until personal information is collected (received) by someone else, it is truly private. No issue of confidentiality arises because no one else holds the information. Only if the information is collected by someone who has an obligation to prevent all or some further disclosure does the information become confidential.

In general, only the person who gives personal information to someone who owes a duty of confidentiality can permit its release. However, laws have carved out many exceptions to this rule. Sometimes the recipient is obliged to report to authorities. For example, most provinces require persons, including health care professionals, to report communicable diseases or suspected child abuse, even if that requires reporting confidential information. Similarly, federal legislation obliges physicians examining a member of a flight crew to report a medical condition likely to constitute a hazard to aviation safety. Any person receiving a court order to produce patient records must also breach the confidence. There may even be the duty of a physician at "common law" to warn on learning that a patient intends to harm or kill someone.

Legislation covering hospital records creates other exceptions to the confidentiality rule. Hospitals are required to collect and maintain information about patients. Generally, the legislation states that this information is confidential and must not be disclosed to anyone; yet often the same legislation contains exceptions. Sometimes the hospital is *obliged* to disclose the information — for example, to comply with a court order; other times, it is given the *discretion* whether or not to disclose it, such as for disclosures to a patient.

Exceptions to an obligation not to disclose confidential personal information weaken the control of individuals over information about themselves. In other words, they diminish privacy.

The remainder of this report surveys the legal foundations of privacy of information and confidentiality in Canada.

# Part 2. Identifying a Hierarchy of Legal and Other Obligations Relating to Privacy and Confidentiality

There are two main sources of confusion in discussions of privacy and confidentiality. The first is the many sources of legal and other obligations relating to privacy and confidentiality; one may need to consult many authorities to determine the applicable law. The second is the need to identify a hierarchy when two or more laws or other obligations conflict (that is, when they both address the same situation, but set out conflicting rules). One law may state that medical records are confidential and must not be disclosed; another may say that records must be disclosed to a coroner. Which prevails?

In the short term, nothing can be done about the multitude of legal and other obligations touching on privacy. General data protection legislation has helped somewhat to establish broad privacy protection standards, but only for the federal government and the four provincial governments that have enacted such legislation. Even where general data protection legislation is in force, a multitude of other laws may govern specific situations. In the long term, however, governments might be cajoled into enacting more comprehensive provisions that will make the law less fragmented.

The second task — setting out the hierarchy — is somewhat simpler. The following section attempts to set out general rules on which laws prevail if there is a conflict between two or more.

Several sources of law govern privacy and confidentiality (Part 3 explains these in greater detail):

- international law, such as the International Covenant on Civil and Political Rights;
- the Canadian Charter of Rights and Freedoms<sup>8</sup> (the Charter), which sets out constitutional rights and freedoms;
- federal and provincial data protection legislation (for example, the federal Privacy Act) that sets out general rules on the collection, use, and disclosure of personal information by governments;
- federal and provincial legislation governing specific situations (such as the Income Tax Act, which governs the use and disclosure of one type of personal information — that relating to income tax);
- the common law law that is not set out in legislation but has evolved through successive court decisions;
- professional codes of conduct, some of which may be incorporated into legislation; and
- professional ethics and guidelines.

Assume the following: that the Charter, general data protection legislation, legislation dealing specifically with an issue, the common law, professional codes of conduct, ethics and professional guidelines each stated rules governing a given situation, but the rules conflicted. Which would govern? (International law also sets out privacy rights. Generally, however, international law is given force in Canada by including its principles in federal or provincial legislation. Accordingly, it is not considered as a separate category in this discussion of hierarchy.)

At the risk of overlooking exceptions, the hierarchy is generally as follows:

- rules in the Charter take precedence over all other rules in federal or provincial legislation;
- rules in legislation governing specific situations take precedence over rules in general legislation, unless there is a provision stating that the general act takes precedence; to
- rules in any form of legislation take precedence over common law rules;
- common law rules may take precedence over rules in professional codes of conduct;<sup>11</sup> and
- rules in professional codes of conduct take precedence over general ethical rules and guidelines.

Sometimes federal legislation and provincial legislation conflict. Deciding which prevails is a question of constitutional law that may need to be resolved in court. A court can determine which level of government has the constitutional authority to pass laws governing a particular issue. Legislation passed without constitutional authority (legislation that is "unconstitutional") may be declared null and void. The victor — the legislation that is found to be constitutional — then governs the situation.

Note that the Charter does not apply to the private sector directly. Thus, a person cannot claim that a Charter privacy right is violated when a neighbour collects information about him or her<sup>12</sup> unless legislation authorized the collection. The Charter does apply to *legislation* governing the private sector. If the legislation violates a Charter right, it may be declared "of no force or effect." The law would then revert to its state before the legislation was enacted.

Remember that the relationship between conflicting laws may be more complex than this. This hierarchy (summarized in Exhibit 1) is a general guide only.

# Exhibit 1. Hierarchy of Laws Relating to Privacy and Confidentiality

- Constitutional law (the Charter) 1.
- Legislation stating that it takes precedence over other legislation 2
- 3. Federal and provincial legislation governing specific situations
- General legislation 4.
- 5 Common law
- Professional codes of conduct 6.
- 7. Professional ethics and guidelines

# Part 3. Establishing and Protecting Privacy Rights

# International Obligations

Several international agreements incorporate rights relating to privacy. On 10 December 1948, the United Nations General Assembly adopted a Universal Declaration of Human Rights. 13 The preamble proclaimed the document as a "common standard of achievement for all peoples and all nations." In addition, Article 3 states: "Everyone has the right to life, liberty and security of person."

Article 12 also explicitly states a privacy right:

No one shall be subjected to arbitrary interference with his privacy. family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The General Assembly adopted the International Covenant on Civil and Political Rights on 16 December 1966. Canada has acceded to the covenant. Article 17 contains privacy principles similar to those found in the Universal Declaration of Human Rights:

17(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

17(2) Everyone has the right to the protection of the law against such interference or attacks.

Article 9, although apparently directed at the criminal justice milieu, could be interpreted to contain an implicit privacy right:

9(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The rights set out in Article 9 are not to be subject to any restrictions except those provided by law; Article 12(3) sets out those necessary to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others; and those consistent with the other rights recognized in the covenant.<sup>14</sup>

Canada has also sought to enhance privacy protection through international vehicles other than international law. In 1984, Canada joined 22 other industrialized nations by adhering to the Organization for Economic Co-operation and Development (OECD)<sup>15</sup> Guidelines for the Protection of Privacy and Transborder Flows of Personal Data.<sup>16</sup> The guidelines are intended to harmonize data (privacy) protection laws and practices among OECD member countries by establishing minimum standards for handling personal data (information).<sup>17</sup> Personal data means any information relating to an identified or identifiable individual.<sup>18</sup> Unlike the other international instruments mentioned above, which protect privacy rights in general, the guidelines protect only one aspect of privacy — the privacy of personal data.

The guidelines apply to both the public and private sectors. However, since they constitute a voluntary code of conduct, they are not legally binding on governments or the private sectors of OECD member countries. Among the principles stated in the guidelines are a number intended to promote conformity in how countries and their private sectors handle personal data. These are the following:

# Collection Limitation Principle (Para. 7)

There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

# Data Quality Principle (Para. 8)

Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

# Purpose Specification Principle (Para. 9)

The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

#### Use Limitation Principle (Para. 10)

Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 9 except:

- a) with the consent of the data subject [the person]; or
- b) by the authority of law.

#### Security Safeguards Principle (Para. 11)

Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.

#### Openness Principle (Para. 12)

There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

## Individual Participation Principle (Para. 13)

An individual should have the right:

- (a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;
- (b) to have communicated to him, data relating to him
  - (i) within a reasonable time;
  - (ii) at a charge, if any, that is not excessive;
  - (iii) in a reasonable manner: and
  - (iv) in a form that is readily intelligible to him;
- (c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and
- (d) to challenge data relating to him and, if the challenge is successful, to have the data erased, rectified, completed or amended.

The guidelines also seek to promote freer flows of personal data among OECD members (transborder flows). Among the major principles are the following:

17. A Member country should refrain from restricting transborder flows of personal data between itself and another Member country except where the latter does not yet substantially observe these Guidelines or where the re-export of such data would circumvent its domestic privacy legislation. A Member country may also impose restrictions in respect of certain categories of personal data for which its domestic privacy legislation includes specific regulations in view of the nature of those

data and for which the other Member country provides no equivalent protection.

18. Member countries should avoid developing laws, policies and practices in the name of the protection of privacy and individual liberties, which would create obstacles to transborder flows of personal data that would exceed requirements for such protection.

# **Canadian Constitutional Obligations**

The constitutional authority for the protection of several important values — including fundamental freedoms and legal rights — is the *Canadian Charter of Rights and Freedoms*. The Charter applies to all federal and provincial governments. Quebec, however, has opted out of certain provisions of the Charter, including those that affect privacy.<sup>19</sup>

The Charter contains no explicit statement of the right to privacy, although several organizations and representatives of political parties had recommended the inclusion of the right during the 1981 debates of the Joint Committee on the Constitution. Over the past decade, however, the courts have interpreted the Charter as providing limited implicit constitutional rights of privacy.

Three sections of the Charter — Sections 7, 8, and 1 — are particularly germane. Section 7 reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

#### Section 8 reads:

Everyone has the right to be secure against unreasonable search or seizure.

#### Section 1, the limiting clause, states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Thus, the privacy rights implicit in Sections 7 and 8 are not unlimited (absolute). Section 1 permits reasonable limits to be placed on the exercise of these rights if the limits are prescribed by law and if they can be demonstrably justified in a free and democratic society.

Section 8 has been interpreted in the following ways, confirming that it contains an implicit constitutional right to privacy:

- to invalidate the seizure of a blood sample from an accused without consent;<sup>20</sup>
- to question the validity of border searches;<sup>21</sup>
- to challenge video surveillance of illegal gambling in a hotel room as a violation of a reasonable expectation of privacy;<sup>22</sup> and

• to legitimate searches of vehicles without a warrant in specific circumstances<sup>23</sup> or searches of a person on arrest.<sup>24</sup>

In one 1988 case, *R. v. Dyment*, <sup>25</sup> the Supreme Court of Canada identified three areas where Section 8 could be used to assert privacy claims against government: claims involving territorial or spatial aspects, claims related to the person, and claims arising in the information context.

In *R. v. Morgentaler, Smoling and Scott*, <sup>26</sup> two justices of the Supreme Court of Canada argued that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person, contrary to Section 7 of the Charter.

The privacy rights that courts have implied in the Charter have emerged primarily in criminal matters. The extent to which Sections 7 and 8 may protect the privacy of information in non-criminal matters is not clear. This is one reason for the call by the Privacy Commissioner of Canada in 1991 for an explicit and broad right of privacy to be included in the Charter.<sup>27</sup>

A person whose rights under the Charter have been "infringed or denied" can apply to an appropriate court for help. Under Subsection 24(1), the court can order a remedy that it considers "appropriate and just in the circumstances." This provision opens up a broad range of options for a court facing governmental action that violates the Charter. Among them is the right to declare a law that offends the Charter to be "of no force or effect."<sup>28</sup> Thus, even if federal or provincial legislation permits collecting, using, or disclosing personal information in certain situations, the Charter may block the legislation if the legislation violates a Charter right.

Under Section 32, the Charter applies to the Parliament and Government of Canada for all matters within Parliament's authority. Under this section, it also applies to the legislature and government of each province for all matters under provincial authority. The Charter does not apply directly to the private sector; however, legislation affecting the private sector that is passed by Parliament or a legislature is subject to the Charter.

There is no provincial *constitutional* document anywhere in Canada that protects privacy.<sup>29</sup> Quebec, however, has elevated the status of the privacy rights stated in its *Charter of Human Rights and Freedoms* to prevail over other provincial legislation. Thus, the Quebec Charter almost assumes the guise of a provincial constitutional privacy right.<sup>30</sup> Article 5 states that every person "has a right to respect for his private life." Originally enacted in 1975, the Charter was amended in 1982 so that its privacy provision, among others, prevails over other provincial legislation unless the other legislation expressly states that it applies despite the Charter.<sup>31</sup> Given that Quebec has opted out of the protections of the Canadian Charter, the Quebec Charter assumes considerable importance as a means for protecting privacy.

# Federal and Provincial Data Protection Legislation

Most, if not all, European nations have enacted data protection legislation (often called "privacy protection" legislation in Canada). Such laws generally regulate the collection, use, and disclosure of personal information by governments and the private sector. They also establish a person's right of access to personal information held by these groups.

In 1983, the federal Privacy Act<sup>32</sup> came into force. It was preceded by provincial privacy legislation in Quebec (1982). The first Ontario privacy legislation came into force in 1988. On 1 April 1992, Saskatchewan's data protection legislation came into force. British Columbia has also enacted data protection legislation, which received Royal assent on 30 June 1992 and is expected to come into force in the autumn of 1993.<sup>33</sup> Several other provinces have incorporated some data protection principles into their access to information legislation.

Like their European and U.S. counterparts, these Canadian statutes regulate the collection, use, and disclosure of personal information and grant rights of access to the information. Unlike the European laws, Canadian data protection laws — federal or provincial — do not apply to the private sector.<sup>34</sup>

These acts are directly relevant to personal information collected by governments about new reproductive technologies. The acts set the minimum privacy conditions for government institutions that may want to collect, use, or disclose personal information relating to these technologies. They set minimum standards for the disclosure of such information for research purposes. They limit the ability of one person (for example, a child born through a donation of sperm) to see information held by government about another (for example, the sperm donor).

Only information that can be linked to an identifiable person (personal information) is covered by these statutes. Collection, use, or disclosure of information that cannot be linked to an identifiable person is not covered. Even if the initial collection of personal information is covered by data protection legislation, a government institution may later remove all personal identifiers linking the information with a person. The provisions of data protection statutes will no longer apply to this anonymous information.

For example, an institution may collect information about the state of health of a named person for government files. Because the information can be linked to an identifiable person, the collection must comply with the data protection legislation. As explained in detail below, this means in general that the information must be collected directly from the person, and the person must be told the purpose of the collection. If researchers then ask the institution to disclose this information to them, the disclosure must follow the rules set out in data protection legislation. However, if before disclosing the information the institution removes all personal identifiers that can link the information with a specific person, the information is no

longer covered by the legislation. It is no longer personal, and the institution need no longer comply with the disclosure provisions of the data protection legislation.

In short, while the information remains personal, government institutions must comply with the data protection legislation. After the institution removes personal identifiers from the information, the institution is no longer bound by the data protection legislation.

The following sections describe relevant sections of the federal Privacy Act and its provincial counterparts. The federal act is explained first and in greatest detail. The provincial acts are broadly similar in philosophy. They are explained only briefly in the text. A more detailed explanation of them is found in Appendix 1.

#### The Federal Privacy Act

The federal Privacy Act makes the following requirements of some 150 federal government institutions:

- collect only the personal information needed to operate programs;
- collect the information directly from the person concerned, if possible;
- tell the person how it will be used;
- use personal information only for the purpose for which it was collected or for a "consistent" purpose;
- disclose the information only as the act permits;
- take all reasonable steps to ensure the accuracy and completeness of the information;
- allow the person access to his or her personal information; and
- allow the person to make objections to the correctness of personal information kept by government, have the objections stated on file, request changes to the file, and notify users of the information of the objections.

Provisions on collection, use, disclosure, and access apply only to personal information as the act defines it. Personal information means information about an identifiable individual that is recorded in any form. It includes information relating to race, ethnic origin, colour, and medical history. The definition is clearly broad enough to cover the personal information generated through the use of new reproductive technologies.

# Collection of Personal Information

Section 4 of the act embodies the philosophy that government institutions should collect only the information they truly need: "No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution."

The key issue in every case of collection is whether the information collected relates directly to an "operating program or activity." The Office

of the Privacy Commissioner of Canada has interpreted this as requiring legislative authority for the mandatory collection (through testing) of information about human immunodeficiency virus (HIV) antibody status, drug use, or many genetic traits. Such legislation would satisfy Section 4 by making it clear that the collection was directly related to the operating program or activity of the institution.

In other situations, the Office of the Privacy Commissioner is less adamant that there be explicit statutory authority to collect personal information. Whether specific statutory authority beyond general authorizing legislation is needed to collect personal information will depend largely on its potential sensitivity. One's date of birth is personal information. However, it is generally not as sensitive as information about a medical disorder that will lead to premature death.

The greatest practical impact of Section 4 lies in regulating the mandatory collection (collection without the consent of the person) of personal information. However, Section 4 also regulates the collection of volunteered information. Volunteered information must pass the same relevance test under Section 4 as personal information collected without consent, such as through a mandatory testing program.

#### Direct Collection

In general, Section 5 of the Privacy Act requires personal information to be collected directly from the individual to whom it relates.<sup>38</sup> Collection other than direct collection is allowed in three situations:

- 1. if direct collection is not possible;
- 2. if the individual authorizes collection other than direct collection; or
- 3. if the institution is entitled to receive the personal information under certain disclosure provisions of the act (Subsection 5(1), for example, would allow a government institution to collect personal information indirectly if an act of Parliament or regulation permitted another government institution to disclose the information to the first institution).<sup>39</sup>

Subsection 5(2) requires in general that government institutions tell a person why personal information is being collected. However, the person need not be told the purpose of the collection in two other circumstances mentioned in Subsection 5(3): where informing might result in the collection of inaccurate information, or where it might defeat the purpose or prejudice the use for which the information is collected.

# Retention and Disposal of Personal Information

Subsection 6(1) of the act imposes retention requirements for personal information that has been used for an administrative purpose (the act defines this<sup>40</sup> as information that has been used in a decision-making process that directly affects the individual). The information must be

retained for a period set out in the act's regulations. Subsection 4(1) of the Privacy Regulations<sup>41</sup> generally requires retention for at least two years.

# Accurate, Up-to-Date, and Complete Personal Information

Subsection 6(2) of the act requires government institutions to take all reasonable steps to ensure that personal information used by government institutions is as accurate, up-to-date, and complete as possible.

## Uses of Personal Information

Section 7 of the act restricts the uses of personal information by government institutions. Personal information can be used for any purpose if the person to whom it relates consents. If the person does not consent, the information can be used in three ways only:

- 1. for the purpose for which the information was obtained or compiled by the institution;
- 2. for a use consistent with that purpose; or
- 3. for a purpose for which the information may be disclosed to the institution under Subsection 8(2). Subsection 8(2) identifies several situations where personal information can be disclosed by one institution to another.

The second use — consistent use — requires explanation. Consistent use is easiest to define in the negative. For example, if blood were taken for a medical diagnosis, it would not be a consistent use of the blood or information derived from it to use it in a criminal prosecution. Nor would it seem a consistent use to use the information to assess genetic traits that might affect the person's employability.

At the other end of the scale, determining if a use is consistent becomes more difficult. If blood samples assembled to determine the prevalence of a trait in a group of people were then used to determine the prevalence of another trait, would that be a consistent use?

# Disclosure of Personal Information

Subsection 8(1) states the general rule about disclosure of personal information: a government institution must not disclose personal information unless the person to whom it relates consents. Subsection 8(1) therefore imposes an obligation of confidentiality. Subsection 8(2), however, lists several exceptions to this obligation, among them the following:<sup>42</sup>

- disclosure for the purpose for which the information was obtained or compiled (for example, if the intention in collecting the information is to disclose it to the police, the disclosure to the police without the person's consent is proper);
- disclosure where a federal law or regulation permits disclosure;
- disclosure to comply with a warrant or subpoena or court order;

- disclosure to an investigative body;
- disclosure to foreign states or organizations of states under an agreement or arrangement;
- disclosure in the public interest; and
- disclosure for research.

Under Paragraph 8(2)(m), the head of a government institution may disclose personal information when he or she decides it is in the public interest to do so, or when it would clearly benefit the individual to whom it relates.

Subsection 8(2) states that the disclosures permitted by the Privacy Act are "subject to any other Act of Parliament" — that is, other federal laws may enlarge or restrict the disclosure provisions of the Privacy Act. For example, a federal law could require or permit the disclosure of personal information in circumstances that the Privacy Act alone would not permit. The law would take priority over the Privacy Act if there were a conflict between the two. In fact, there are many provisions in other federal legislation that regulate the disclosure of personal information. These provisions take precedence if they conflict with the Privacy Act.

#### Access to One's Own Personal Information

The Privacy Act gives individuals the right to see personal information about themselves contained in most government files, specifically:

- (a) any personal information about the individual contained in a personal information bank; and
- (b) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.<sup>45</sup>

In limited circumstances, the head of a government institution may refuse to disclose personal information to the person to whom it relates. Under Section 28, for example, the head may refuse to disclose personal information that relates to the physical or mental health of an individual if examining the information would be contrary to the individual's best interests.

The act gives the person concerned the right to request correction or annotation of information held in personal information banks.  $^{46}$  The person may also require that institutions that have used the information be notified of the correction or annotation.  $^{47}$ 

# Powers of Investigation

The act gives the Privacy Commissioner the power to investigate complaints about breaches of the act. However, the commissioner has no powers to enforce the act or to penalize those who violate it — the commissioner's principal recourse is persuasion and publicity. Nor does

the act create any penalties that could be imposed by a court for violating the collection, use, disclosure, or access provisions.<sup>48</sup>

# **Provincial Data Protection Legislation**

At present, three provinces — Ontario, Quebec, and Saskatchewan — have comprehensive data protection legislation in force.<sup>49</sup> The provincial acts each regulate the collection, use, and disclosure of personal information and access rights to that information. Appendix 1 sets out the details of each statute.

The thrust of the federal and provincial data protection laws are similar. However, there are some important differences:

- The federal Privacy Act regulates the activities of federal government institutions only. The provincial equivalents regulate provincial government institutions.
- The federal Privacy Act contains no powers of enforcement. The Privacy Commissioner of Canada may investigate complaints about violations of the Privacy Act by government institutions. His or her only real remedy if he or she finds a breach of the act is to recommend changes to government and to bring to public scrutiny institutions that do not accept the recommendations. Similarly, the Saskatchewan act allows the information and privacy commissioner to recommend that government institutions cease or modify practices that violate the act, but gives no powers of enforcement to the commissioner. The Quebec and Ontario acts, however, do contain enforcement provisions. Their respective privacy authorities have the power to make orders.
- There are no offences under the federal Privacy Act for failing to comply with the collection, use, disclosure, and access provisions of the act. All three provinces have made it an offence to violate their acts.
- Nothing in the federal or Saskatchewan acts says that they prevail over other legislation. Other legislation dealing with a specific aspect of privacy (for example, the Income Tax Act provisions governing confidentiality) prevails over the federal Privacy Act if there is a conflict. Similarly, specific Saskatchewan legislation could override the general provisions of the Saskatchewan data protection legislation. The Quebec and Ontario acts both state that their provisions prevail in case of conflict with other legislation unless the other legislation specifically states otherwise. 50

# Disclosure of Personal Information for Research Under Federal and Provincial Data Protection Legislation

All federal and provincial data protection statutes permit the disclosure of personal information for research without the consent of the person concerned. The rules on disclosure for research are particularly relevant to the work of the Commission.

The Federal Privacy Act

The act allows the disclosure of personal information, without a person's consent, to any person or body for research or statistical purposes if the head of the government institution

... is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and

... obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates.<sup>51</sup>

The Ontario Freedom of Information and Protection of Privacy Act, 1987, and the Municipal Freedom of Information and Protection of Privacy Act, 1989

Personal information held by an institution may be released for a research purpose if:

- (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected, or obtained;
- (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form; and
- (iii) certain terms and conditions have been approved by the responsible minister (these terms and conditions relate to security and confidentiality, the early removal or destruction of the individual identifier or identifiers associated with the record, and the prohibition of any subsequent use or disclosure of the record in individually identifiable form).<sup>52</sup>

The Saskatchewan Freedom of Information and Protection of Privacy Act

The act allows disclosure for research purposes under circumstances broadly similar to those mentioned in the federal and Ontario legislation. <sup>53</sup> Before disclosure to researchers is permitted, the head of the government institution must be satisfied that the purpose for which the information is to be disclosed is not contrary to the public interest and cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates; and obtain from the researcher a written agreement not to make a subsequent disclosure of the information in a form that could reasonably be expected to identify the individual to whom it relates.

The Quebec Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information

The Commission d'accès à l'information may, without a person's consent, authorize release of nominative (personal) information for study, research, or statistical purposes.<sup>54</sup> The commission must be satisfied that the intended research use is not frivolous and that the ends contemplated cannot be achieved without nominative information. It must also be satisfied that the nominative information will be used in a manner that ensures its confidentiality.<sup>55</sup>

# Common Law Tort of Invasion of Privacy

Until legislatures enact statutes governing certain matters, the common law — the law that has evolved through successive judicial decisions — may govern an issue. In many states of the United States, a common law protection against invasion of privacy exists. <sup>56</sup> In short, a person whose privacy has been violated may rely on this common law tort to seek redress, often financial, in court.

A tort can be described in very general terms as a civil wrong, other than a breach of contract, which the law will redress by an award of damages.<sup>57</sup> Tort law exists primarily to require wrongdoers to compensate persons injured by the wrongdoers' actions.

In Canada, however, there appears to be no explicit common law right to privacy at present and therefore no tort of invasion of privacy like that in some U.S. states. In a recent text, one author states:

Canadian courts have never specifically stated what has been said in England, that there is no common law right of privacy, nor any action for invasion of privacy *per se*. Although some judges have expressed the opinion that perhaps such a right, and such an action, may exist, they have not been obliged to found liability upon such a general, abstract, novel right.<sup>58</sup>

A common law action for breach of confidence may also arise. This is discussed below as it relates to physicians under the heading "Common Law Obligations of Physicians."

# **Statutory Tort of Invasion of Privacy**

Many torts evolved from the common law; that is, they evolved out of the changing interpretations by courts of general legal principles over the years — sometimes over a period of centuries. They were not created by a legislature.

In some situations, however, governments have enacted laws to create *statutory* torts. Statutory torts, unlike common law torts, are created by statutes passed by legislatures.

In Canada, four provinces — British Columbia, Saskatchewan, Manitoba, and Newfoundland — have enacted statutory torts of violation

of privacy. This has compensated for the lack of a common law tort of

invasion of privacy.

The British Columbia Privacy Act<sup>59</sup> states: "It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another." The Saskatchewan<sup>60</sup> and Newfoundland<sup>61</sup> legislation contain an almost identical provision.

The Manitoba legislation<sup>62</sup> contains stricter requirements than the laws of the other three provinces, but creates a statutory tort of largely similar

scope. Section 2 of the Manitoba act reads:

2(1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

2(2) An action for violation of privacy may be brought without proof of damage.

All four acts define in part what they mean by a violation of privacy. They mention activities such as auditory or visual surveillance, trespassing, listening to telephone conversations, using the likeness of a person for advertising, and using letters, diaries, or personal documents without permission. However, all four acts are drafted so as to cover other privacy violations not specifically mentioned in the acts. Almost any type of privacy violation — including a violation of the privacy of personal information — could therefore be covered.

Anyone who thinks their privacy has been violated may ask a court for a remedy. Under all four acts, a court may grant a variety of remedies. These include damages (compensation), an injunction, and an order requiring that the person be given a share in any profits that may have been generated by the violation of privacy.

The four acts differ in some respects, such as whether they apply to violations of privacy by the Crown. 63 However, they all have the same

general thrust.

These statutory torts could be used to prevent or obtain compensation for a variety of activities related to the application of, or research into, new reproductive technologies. These include the collection, use, or disclosure of personal information without legal authority. Still, they appear to have been little used to date, perhaps in part because they are not well known. However, growing public sensitivity to invasions of privacy may increase awareness of and reliance on these laws.

The four provincial statutory torts must not be confused with federal and provincial data protection statutes. Unfortunately, many of these acts, though having different functions, have similar names. The four provincial statutory torts are each set out in a "privacy" act. The federal data protection legislation is also set out in a "privacy" act. The federal act regulates when and how government institutions can collect, use, and disclose personal information about individuals and gives individuals rights of access to their own personal information. The statutory torts create civil

remedies for a broad range of privacy violations, not just violations of privacy of information. The federal and provincial data protection acts do not apply to privacy violations by private citizens; the statutory torts do.

In Quebec, there is no statutory tort of violation of privacy. However, Article 1053 of the Quebec Civil Code may provide a similar protection. It states: "Every person capable of discerning right from wrong is responsible for the damage by his fault to another, whether by positive act, imprudence, neglect or want of care."

In addition, Quebec amended its Civil Code in 1987 to include principles relating to respect for privacy. These amendments will enter into effect in the near future. The privacy protection in the amended code reads: "Every person has a right to the respect of his reputation and privacy. No one may invade the privacy of another person except with the consent of the person or his heirs or unless it is permitted by law."64

Invasion of privacy includes the interception of private communications, unauthorized publicity, and "observing a person in his private life by any means."65 Thus, the scope of the Civil Code appears similar to that

of statutory torts in other provinces.

# Other Sources of Obligations

The obligation to keep personal information in confidence can arise in several additional ways — through specific legislation (often provincial legislation relating to health care or social services), the common law, professional ethics, and guidelines on the conduct of certain bodies. Other laws may create exceptions to the duty of confidentiality.

This section surveys various additional sources of the obligation of confidentiality relating to personal information. Details of relevant

legislation are contained in the appendices to this report.

# Common Law Obligations of Physicians

In brief, Canadian courts have recognized a qualified common law duty on physicians not to reveal confidences obtained through the physicianpatient relationship. In St. Louis v. Feleki<sup>66</sup> the court affirmed the existence of the common law requirement of confidentiality as follows:

The requirement of confidentiality arising from a doctor-patient relationship has been confirmed in common law. The Supreme Court of Canada recognized the "obligation of secrecy which rests upon the medical practitioner in relation to professional secrets acquired by him in the course of his practice." These confidences are viewed as the "secret of the patient" and "normally, [are] under his control."

In Hay v. University of Alberta Hospital, Madam Justice Picard described the duty of confidentiality as follows:

The physician-patient relationship is clothed with confidentiality, a right which may be waived by the patient. Confidentiality is an important attribute of the physician-patient relationship, essential in promoting open communication between physician and patient. The patient may expressly waive this right or, by his actions, be found to have impliedly waived it. Alternatively, an overriding public interest or a statutory direction may justify a physician disclosing information about the patient. In the absence of such circumstances, the right remains and a physician who divulges confidential information could face an action for breach of confidentiality, a possibility which obviously causes physicians some concern.<sup>67</sup>

In Solicitor-General of Canada v. Royal Commission of Inquiry into Confidentiality of Health Records in Ontario, 68 physicians and hospital employees had disclosed confidential patient information to the RCMP. In a dissenting Supreme Court of Canada opinion, Chief Justice Laskin quoted an Ontario Court of Appeal decision with approval. In that decision, Mr. Justice Dubin described the duty of confidentiality:

Members of the medical profession have a duty of confidentiality with respect to their patients. They are under restraint not to volunteer information respecting the condition of their patients or any professional services performed by them without their patients' consent. In the absence of such consent, members of the medical profession breach their duty if they disclose such information unless required to do so by due process of law.<sup>69</sup>

The common law duty of a physician to preserve confidentiality is thus clearly accepted by Canadian courts. However, the case law indicates that the duty is qualified. This is primarily because specific laws have been enacted to require or permit physicians to breach confidentiality in some situations. Examples of these laws are explained immediately below.

## Statutory Obligations and Permissible Disclosures

Data protection legislation both imposes a statutory obligation of confidentiality and identifies when confidential information may or must be disclosed. Similar provisions can be found in numerous other acts, provincial and federal. This section describes further statutory obligations, generally those arising in the medical, research, or social services context.

# Physicians

Provincial legislation governs the professional conduct of physicians and some other health care professionals. Often, however, the legislation does not explicitly set out a duty of confidentiality as part of its standards for professionals. This gap is sometimes closed by relying on the confidentiality provisions of codes of professional conduct when deciding whether a person is guilty of professional misconduct under the legislation.

One author makes the following observation:

In the majority of provinces, the legislation [governing the medical profession] makes no reference to [the Canadian Medical Association's] Code of Ethics, and its references to standards of ethical behaviour are set out in the most general manner.

In the majority of the provinces, the interpretation of "unprofessional or unbecoming conduct" has not been codified by statute or regulation. For the most part, the Canadian Medical Association's Code of Ethics remains the foundation for the assessment of cases of unethical practice. $^{70}$ 

It therefore appears that the Canadian Medical Association's *Code of Ethics* will be used in many provinces to decide whether there has been "professional misconduct" through a breach of confidence. Rule 6 of the code sets out the duty to respect patient confidentiality:

An ethical physician ... will keep in confidence information derived from his patient, or from a colleague, regarding a patient and divulge it only with the permission of the patient except when the law requires him to do so. $^{71}$ 

In all the provinces, provincial statutes govern the professional conduct of physicians. For example, the Saskatchewan Medical Profession Act, 1981<sup>72</sup> permits the Council of the College of Physicians and Surgeons to make by-laws defining professional misconduct. Under Section 46, a physician may be disciplined for "unbecoming, improper, unprofessional or discreditable conduct." This includes wilfully betraying a professional secret.

Examples of other provincial legislation regulating the professional conduct of physicians are contained in Appendix 2.

#### Others

Many acts impose obligations of confidentiality on persons dealing with personal information, whether or not they are physicians. For example, the Prince Edward Island Adult Protection Act<sup>73</sup> obliges anyone employed in administering the act to "preserve secrecy with respect to all matters of a confidential nature" received in the course of the person's duties. It is an offence to contravene the act or regulations, with a maximum fine of \$1 000, imprisonment for not more than six months, or both.

Often the same piece of legislation that imposes the duty to keep information in confidence sets out exceptions requiring or permitting disclosure. Regulations under the Saskatchewan Hospital Standards Act<sup>74</sup> are one example. They state that the health record of a patient "shall be the property of the hospital and shall remain confidential" except where the regulation *obliges* disclosure (for example, for court proceedings or to a coroner)<sup>75</sup> or where the regulation *permits* disclosure.<sup>76</sup>

Further examples of such legislation are found in Appendix 2.

# **Ethical Obligations**

Ethical principles have a place in a discussion of privacy and confidentiality.<sup>77</sup> The ethical principle of autonomy, for example, "implies both physical and psychological control" over oneself.<sup>78</sup> A recent study paper prepared for the Law Reform Commission of Canada suggests,

"Another area in medicine where autonomy has an important role is that of the maintenance of confidentiality, the guarding of shared secrets." 79

Similarly, the ethical principles of beneficence and non-maleficence have implications for privacy and confidentiality. One can argue, for example, that beneficence — serving the well-being of others by promoting their good — can be achieved in part through respecting confidences. <sup>80</sup>

# Professional Oaths and Research Guidelines

Every physician takes the Hippocratic Oath. It reads, in part, as follows:

Whatever in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.

Rule 6 of the *Code of Ethics* of the Canadian Medical Association, set out above, states a modern version of this duty.

In 1981, the 34th Assembly of the World Medical Association held that:

The patient has the right to be cared for by a physician who is free to make clinical and ethical judgments without any outside interference.

The patient has the right to expect that his physician will respect the confidential nature of his medical and personal details.

In 1985, the Canadian Medical Association published a policy statement<sup>81</sup> about the confidentiality of medical records:

Confidentiality, Ownership and Transfer of Medical Records

The Canadian Medical Association (CMA) regards medical records as confidential documents, owned by the physician/institution/clinic that compiled them or had them compiled ... The CMA is opposed to legislation at any level which threatens the confidentiality of medical records. 82

In 1985 the Canadian College of Health Record Administrators (CCHRA) and the Canadian Health Record Association adopted the Code of Practice for Safeguarding Health Information. The code is not legally binding but could become an accepted standard of practice. In part, the code states:

The underlying principle is that all health information related to an individual must be treated as confidential. This information may be written, verbal or in other form ...

- 1. All individuals, institutions and organizations maintaining, handling or processing health information shall:
  - have written policies regulating access to, release of, transmittal and destruction of health information;
  - educate all their employees with regard to maintaining confidentiality of information, and have them sign a pledge of confidentiality.
     This procedure shall apply also to researchers, volunteers,

contracted individuals and employees of firms and corporations performing contract work ...

7. In research, individual confidentiality shall be maintained in the handling of information and any reporting or publication of findings.

In 1985, the Board of Directors of the British Columbia Health Association adopted guidelines for the confidentiality of health information. The guidelines recommended that health care facilities have written policies and procedures on managing confidential health information. They recommended that legislation impose a duty on all persons working in a health care facility to respect the confidentiality of health information. The guidelines also recommended measures to control the access to and disclosure of confidential health care information. They called for regulations under the British Columbia Hospital Act to address access to and discharge of confidential health information. The guidelines would also allow the disclosure of identifiable health information to qualified researchers without consent if certain conditions were met. A human experimentation committee would first need to be satisfied that

- 1. the information is indispensable for purposes of the research;
- 2. the importance of the research justifies an invasion of privacy; and
- 3. the principal investigator undertakes to provide adequate security for the information, to destroy the information at the earliest opportunity following completion of the project, and to not further disclose the information except as required for the project or by law.

In 1987, the Medical Research Council of Canada (MRC) published its *Guidelines on Research Involving Human Subjects*. <sup>83</sup> The primary aim of the guidelines was to define the MRC's expectation of the research community in any research funded by the MRC. <sup>84</sup> Chapter VI deals with confidentiality. It reads as follows:

As in therapy, the general rule in research is that confidentiality cannot be breached without the subject's consent. The rule is a strict one, and should be observed from the beginning of the research initiative. The ordinary ethical requirement of confidentiality is reinforced by two principles of research: a) patients should not be approached by strangers who know their medical circumstances, and b) the management of patients should not be influenced by their decision not to participate.

Where subjects give consent to research, access to personally identifying information and its use in research must be guarded. Identifiable data should be coded at the earliest possible time and involve a minimum number of research staff. No one outside the research team should be permitted to handle identifying data. Only those who need to link the data to a particular subject should be able to do so. Junior staff in the research program should be impressed with the need to guard data

against disclosure through discussion in the company of persons outside the program. Identifiable data should be held secure from theft, copying, interception and casual release.

Publication of research findings cannot allow for subject identification without prior consent. If identifying information is to be maintained for the purpose of contacting subjects for later projects, or for long-term follow-up of effects of treatment, this intention must also be disclosed to the subject.

A particular problem of confidentiality arises in investigations of the genetic or familial aspects of disease. Investigators may want to approach a subject's relatives to gather additional data or to warn of potential implications. Access to relatives must in principle be controlled by subjects themselves; subjects may be anxious to protect the confidentiality of their medical conditions particularly from their families. No approach for research purposes can therefore be made without a subject's consent. Consent may be more easily given when confidentiality of the subject can be maintained, but that may not be possible in genetic studies. Even when subjects consent, approaches to family members should be through them rather than directly through investigators, because individuals must not be approached by strangers bearing intimate information about them. Alternatively, physicians of family members may be asked to act as intermediaries.

An investigator's wish or sense of duty to warn family members against genetically-based risks of severe harm, for example, from certain activities or foods, may be controlled by general rather than research ethics, but the issue should be considered by the REB [Research Ethics Board]. A legal duty to warn of the circumstances may override obligations of confidentiality.

When potential subjects are offered undertakings of confidentiality, care must be taken not to promise more than can be achieved. Apart from legal duties to warn mentioned above, research records are liable to subpoena. Courts and judicial tribunals always have final power to require disclosure either in a restricted or public way.

Accordingly, potential subjects may be only offered protection of confidentiality within the limits of the law. Destruction of data not subject to a restraining order of a court may protect confidentiality, but at the cost of not being able to contact subjects upon later evidence of risk to them, or of follow-up studies, of re-calculation of data, or of investigators' means to explain and defend their methods and their findings. <sup>85</sup>

Note that these are guidelines only. Legal obligations take precedence. Even so, the guidelines could perhaps be used as evidence of accepted research practice in a legal dispute.

In 1991, the Steering Committee of the Council for International Organizations of Medical Sciences (CIOMS)<sup>86</sup> completed its International

Guidelines for Ethical Review of Epidemiological Studies. The guidelines address privacy concerns and confidentiality in part:

#### Ϊ. Introduction

- These Guidelines are intended for the guidance of investigators, health policy-makers, members of ethical review committees, and others in dealing with ethical issues that arise in epidemiology. They may also assist in the establishment of standards for ethical review of epidemiological studies.
- The Guidelines are an expression of concern to ensure that epidemiological studies observe ethical standards. These standards apply to all who undertake any of the types of activity covered by the Guidelines. Investigators must always be held responsible for the ethical integrity of their studies.
- Epidemiology is defined as the study of the distribution and determinants of health-related states or events in specific populations, and the application of this study to control of health problems ...
- Ethical Principles Applied to Epidemiology
- 3. Minimizing Harm ...
- Causing harm and doing wrong

Investigators planning studies will recognize the risk of causing harm, in the sense of bringing disadvantage, and of doing wrong, in the sense of transgressing values ... It is wrong to regard members of communities only as impersonal material for study even if they are not harmed ...

Ethical review [of epidemiological studies] must always assess the risk of subjects or groups suffering stigmatization, prejudice, loss of prestige or self-esteem, or economic loss as a result of taking part in a study. Investigators will inform ethical review committees and prospective subjects of perceived risks, and of proposals to prevent or mitigate them. Investigators must demonstrate that the benefits outweigh the risks for both individuals and groups ...

### Preventing harm to groups

Epidemiological studies may inadvertently expose groups as well as individuals to harm, such as economic loss, stigmatization, blame, or withdrawal of services. Investigators who find sensitive information that may put a group at risk of adverse criticism or treatment should be discreet in communicating and explaining their findings. When the location or circumstances of a study are important to understanding the results, the investigators will explain by what means they propose to protect the group from harm or disadvantage; such means include provisions for confidentiality and the use of language that does not imply moral criticism of subjects' behaviour.

#### 3.3 Harmful publicity

Conflict may appear between, on the one hand, doing no harm and, on the other, telling the truth and openly disclosing scientific findings. Harm may be mitigated by interpreting data in a way that protects the interests of those at risk, and is at the same time consistent with scientific integrity. Investigators should, where possible, anticipate and avoid misinterpretation that might cause harm ...

#### 4. Confidentiality

Research may involve collecting and storing data relating to individuals and groups, and such data, if disclosed to third parties, may cause harm or distress. Consequently, investigators should make arrangements for protecting the confidentiality of such data by, for example, omitting information that might lead to the identification of individual subjects, or limiting access to the data, or by other means. It is customary in epidemiology to aggregate numbers so that individual identities are obscured. Where group confidentiality cannot be maintained or is violated, the investigators should take steps to maintain or restore a group's good name and status.

Information obtained about human subjects is generally divisible into:

*Unlinked information*, which cannot be linked, associated or connected with the person to whom it refers; as this person is not known to the investigator, confidentiality is not at stake and the question of consent does not arise.

Linked information, which may be:

- anonymous, when the information cannot be linked to the person to whom it refers except by a code or other means known only to that person, and the investigator cannot know the identity of the person;
- non-nominal, when the information can be linked to the person by a code (that does not include personal identification) known by the person and the investigator; or
- nominal or nominative, when the information is linked to the person by means of personal identification, usually the name.

Epidemiologists discard personal identifying information when consolidating data for purposes of statistical analysis. Identifiable personal data will not be used when a study can be done without personal identification — for instance, in testing unlinked anonymous blood samples for HIV infection. When personal identifiers remain on records used for study, investigators should explain to review committees why this is necessary and how confidentiality will be protected. If, with the consent of individual subjects, investigators link different sets of data regarding individuals, they normally preserve confidentiality by aggregating individual data into tables or diagrams. In government service the obligation to protect confidentiality is frequently reinforced by the practice of swearing employees to secrecy.

### **Compulsory Reporting Requirements**

Sometimes legislation requires information received in confidence to be reported to government (usually health) officials. These compulsory reporting requirements achieve the same end result (the disclosure of confidential information) as the disclosure requirements found in other legislation. However, compulsory reporting provisions impose an active duty to report. In contrast, disclosure provisions (for example, in data protection or hospital records legislation)<sup>87</sup> merely require the person or institution holding the information to disclose it if asked; there is no obligation to report information if not asked.

For example, the federal Aeronautics Act<sup>88</sup> requires a physician examining a member of a flight crew or an air traffic controller to report to Transport Canada officials if the patient has a medical or optometric condition that is likely to constitute a "hazard to aviation safety."

Provincial health legislation imposes a duty on physicians (and sometimes others, such as school principals, landlords, etc.) to report the incidence of communicable diseases or diseases dangerous to the public health. In some provinces, highway traffic legislation obliges physicians to inform the registrar of motor vehicles if a patient suffers from a medical condition that makes it dangerous to drive. Other provinces make reporting voluntary.

Further examples are discussed in Appendix 3.

In summary, Canadian law governing privacy and confidentiality is complex and fragmented. Identifying the rules to apply to a given situation (disclosure of medical records, collection of personal information by governments or researchers, for example) sometimes requires laborious research. This report has attempted to set out the basic sources of the law, making it easier to analyze the rules that will apply to a given situation. The reader is cautioned, however, not to use this general survey to determine the state of the law on a specific issue; this involves a different, more focussed, type of research.

It is important to remember that the law is not fixed. The common law evolves as judges hear new cases on an issue. Legislatures enact new statutes, amend others, and repeal still others. The interpretation of rules stated in statutes changes as successive courts interpret them. Even constitutional privacy rights can evolve through legislative change and, more likely, judicial interpretation.

## Part 4. New Reproductive Technologies

# Privacy Laws and Principles and Their Application to New Reproductive Technologies

The patchwork of laws on privacy and confidentiality discussed in this report have practical application to new reproductive technologies (NRTs).

This section explores the impact of these laws. It also discusses other privacy issues relating to NRTs — whether gamete donors should be identified to recipients and their offspring, the extent to which NRT researchers should be permitted access to personal information, and whether there should be a central repository of personal information relating to NRTs.

NRTs have privacy consequences simply because they both require and generate personal information. The technologies involved in NRTs — particularly genetic technologies — will reveal a broad range of previously unknown information to NRT practitioners, researchers, and governments. They may reveal that a man is sterile or a woman infertile. They may reveal genetic traits or illnesses that will cause discrimination or embarrassment if made public. They may identify biological relationships, such as paternity, not known even to the persons involved. They will also reveal previously unknown medical information (such as genetic risk factors) to the individuals using NRTs themselves.

The global issue is ascertaining how to enjoy the benefits of these technologies without sacrificing important privacy values. It is not merely a question of obeying the current laws that assert privacy rights, as these laws may be inadequate to deal with the threats posed by NRTs to individual privacy. One therefore needs to look beyond current laws to the principles that should guide the laws.

## The Global Approach

How can the personal information generated by NRTs be safeguarded so that it is collected, used, and disclosed in a way that respects privacy? If it were possible to ignore the present patchwork of laws dealing with privacy and confidentiality and start with a clean slate, the following general privacy principles would likely emerge. They would constitute the minimum necessary protection of privacy in the age of NRTs.

- 1. Educate those working with NRTs to understand that the technologies reveal intimate (and sensitive) characteristics of the individuals involved. Accordingly, extraordinary precautions may be needed to protect privacy.
- Collect only that personal information that is truly necessary to accomplish the task at hand and to serve the interests of the individual. This is the foundation of privacy protection and serves as a caution against the widespread and unregulated collection of personal information simply out of curiosity, no matter how benevolent.

Information generated by NRTs may have many potential applications, not all of them noble. Even a benevolent sense of curiosity should not justify researchers or governments in collecting this information. One cannot misuse or improperly disclose personal information if it is not collected in the first place.

- 3. Obtain the consent of the individual to collect, use, and disclose personal information. When an individual consents to share the information, privacy is not at issue. However, any collection, use, or disclosure that exceeds that permitted by the consent constitutes a violation of privacy. Information should be collected, used, and disclosed without consent or beyond the limits of the consent only in extraordinary circumstances, such as where the law requires.
- 4. Tell the individual the purpose of the collection. Collect personal information from the individual directly, unless agreed otherwise. It is inappropriate to collect information secretly, unless compelling reasons exist for doing so. Compelling reasons are unlikely to arise in the field of NRTs.
- 5. Use personal information only for the purpose for which it has been collected, or for a closely related purpose. For example, it would be inappropriate to use a blood sample taken to test for hepatitis B to determine the genetic traits of the individual unless the individual consents.
- 6. Keep personal information in confidence. Disclose it only to the extent necessary, only for the purposes intended when it was collected (or for a closely related purpose), and only to persons who need to know, and then only if they will preserve its confidentiality.
- 7. Retain personal information only as long as it is needed. Dispose of it securely as soon as possible after that.
- 8. Never use or disclose personal information if it would harm the individual to whom it relates unless there is some truly overriding interest that warrants use or disclosure.
- 9. Allow individuals access to personal information about them.

As stated above, these are the privacy principles that should be adopted if it were possible to start afresh. In fact, these principles are largely found already in international data protection guidelines, such as the OECD guidelines, <sup>89</sup> and in the comprehensive federal and provincial data protection legislation discussed earlier. The OECD guidelines, however, have no legal force, and the legislation covers only the federal government and the governments of three (soon four) provinces. <sup>90</sup> The governments of the remaining provinces and the private sector are not bound by these data protection statutes. There is, accordingly, less privacy protection for personal information that comes into the hands of persons outside government. <sup>91</sup>

The principles set out above go beyond the current legal requirements imposed on the private sector or the majority of provincial governments. Still, even though those working with NRTs may not be required by law to comply with these privacy principles, it makes good privacy sense to do so. Ignoring privacy concerns needlessly diminishes the overall value of NRTs.

## **Applying Privacy Principles**

#### **Gamete Donations**

Gamete donations give rise to one central privacy issue — whether the donor should be obliged to disclose his or her identity to the recipient or

her offspring.

It is medically valuable for a child born through a gamete donation to know the medical history of the gamete donor or donors. Information about a family history of heart disease or a particular form of cancer, for example, could help the child to understand and perhaps reduce the severity of his or her own medical condition. Medical information about the donor could also help potential gamete recipients to decide whether to accept the donation. It is therefore in the public interest to make the medical circumstances of a gamete donor available to the recipient and offspring.

Medical information about the donor can be made available to the recipient or her offspring without identifying the donor. It therefore need

involve no privacy intrusion.

However, where the donor's identity is made available to a recipient, the offspring, or a record-keeping agency, a privacy violation may result. If the donor consented to the collection, use, and disclosure of identifying information, he or she cannot later complain of a violation of privacy. If, however, the information was collected, used, or disclosed without consent, the violation of privacy may be serious. For example, a sperm donor might not wish to have his identity known to the offspring he produces. Revealing his identity against his will could be traumatic.

The converse — having the donor learn the identity of the recipient or offspring — may also result in serious privacy intrusions. The recipient may not want her identity to be revealed. Children may not even have been told that they are the product of gamete donations. Although unlikely, even the spouse of the recipient might not know of the donation. These personal secrets could be revealed needlessly by a careless attitude to privacy or by a policy that permits too much openness.

The issue of identifying the donor comes into relief particularly when weighing the needs of the offspring. If a gamete donor does not want to reveal his or her identity, a recipient can simply reject that donation for one from a donor who will identify himself or herself. Offspring, however, have no such choice. Should offspring who learn that they are the product of gamete donations be permitted to learn the identity of gamete donors, even if the donor objects?

It is difficult to judge which interest should prevail — that of the donor to privacy or that of the child to know the identity of a biological parent. An unyielding privacy advocate might argue that the right of the donor to privacy should always prevail. A children's rights advocate would argue that the offspring have a right to know. The Commission must draw its own conclusions.

One scheme might require the donor to decide when donating whether his or her identity could be released to the recipient or offspring. Once having agreed to be identified, the donor would be bound by this agreement. If the donor originally refused to be identified, the donor could later release his or her identity. In both cases, this would protect the interest of the offspring in knowing the identity of biological parents.

A second scheme might attach greater importance to the donor's privacy. Under this scheme, a donor who consents to being identified could later decide to withhold his or her identity. The offspring would not then

be able to identify a biological parent.

Under both schemes, of course, medical information that did not identify the donor should always be made available to the recipient and the offspring.

A third scheme might give absolute rights to a child to know the identity of a biological parent. This would place all children born through donated gametes on an equal footing. However, it could cause a serious violation of the donor's privacy. This could be avoided by informing all potential donors that their identities might be revealed to biological children. Potential donors who did not want their identities revealed could simply refuse to donate. 92

#### Research

There is a clear need for continuing research involving NRTs. However, there is an equally clear need for individuals to feel confident that their medical circumstances will not become "public" property among researchers. This issue encompasses two specific concerns:

- whether to permit disclosure to researchers at all (a privacy issue), and
- if personal information is disclosed to researchers, how to preserve its confidentiality.

As a general principle, research should rely on anonymous information that cannot be linked to an individual. If research does not use personal information, no privacy issue normally arises. 93 Only if such "non-identifying" research threatens to stigmatize the members of a group (perhaps a racial or ethnic group) by identifying certain traits among its members should there be concern about the privacy implications of the research.

However, some research will unavoidably require access to personal information. At issue here is how to further the development of NRTs through research without violating the privacy of research subjects. After all, a person seeking reproductive help through a NRT is not revealing deeply personal medical secrets for the sake of a research project. Even though the law often allows such information to be released for research under certain controls, 94 few individuals likely know this. How many would

think it appropriate that their personal information could be disclosed for research without their knowledge and consent?

As discussed earlier in this section, the simplest way to avoid privacy violations in research is to obtain the consent of the individual to the collection, use, and disclosure of the information. This should be the cardinal rule of using personal information for research. This means, of course, that researchers must persuade potential subjects of the benefits of the research.

Where individuals do consent to the disclosure of personal information for research, the research program should nonetheless restrict access to the information. Consent by a subject to the disclosure of personal information for research should not be seen as a licence to disclose the information at will or to ignore the need to keep the information confidential. It should be kept in confidence, and disclosed among researchers only as the research requires. Personal identifiers should be removed as soon as the research program permits. They should never be included in published results. Personal information that is no longer needed should be destroyed or, if required by law to be kept, stored securely until it can be destroyed.

Even among a generally supportive population, however, some individuals will not consent. Should researchers be able to obtain access to personal information under these circumstances? In general, no. Only in truly extraordinary circumstances should this be allowed. The research must be vital (with a significant public benefit), the personal information must be vital to that research, and the privacy intrusion must be kept to an absolute minimum. Furthermore, as with the handling of personal information obtained with consent, measures must be taken to restrict access to the personal information and to ensure its destruction or secure storage.

Whether any NRT research is so vital that it outweighs the objections of individuals to losing their privacy is at least questionable. Accordingly, NRT researchers may have to be content with using personal information only if the individual consents.

It may not always be possible to locate potential research subjects to seek their consent, or it might be prohibitively expensive to do so. The same principle as above should apply. The research must be vital (with a significant public benefit), the personal information must be vital to the research, and the privacy intrusion must be kept to an absolute minimum.

#### Changing the Law

In practice, an abundance of laws already permit disclosure for research without an individual's consent. These were discussed in Part 3. These laws do not eliminate privacy intrusions; they merely make them lawful. Many of these laws were enacted before privacy became a highly visible human rights issue and before technology developed the extensive power to intrude that it has today. It may therefore be time to reconsider

laws that permit the disclosure of personal information for research without consent. A revised law could follow the principles delineated in this part.

NRTs are not the only medical enterprise that will involve research. Recommendations for protecting privacy in NRT research, including legislative changes, may therefore influence the handling of privacy issues in other areas — epidemiological research, for example.

## A Data Base of Personal Information Relating to NRTs?

NRTs generate large quantities of intimate personal information. Some of that information will remain with private physicians or clinics. Some may fall into government hands. Should one group be preferred over another to handle this information? Is there any need for a central, perhaps national, repository (data base) of information?

The administrative advantages of maintaining personal information relating to NRTs in a central data base are clear. They make information much more accessible to researchers. They make it much easier to establish a system of "evidence-based" medicine. They also make it easier to link gamete donors with recipients and their offspring.

In spite of administrative and other conveniences, however, the existence of a central data base poses a greater threat to privacy than maintaining the information in several unconnected data bases. This is particularly true if inadequate controls are placed on the use and disclosure of the information.

In practice, only government bodies or agencies created by government would be candidates for assembling a central data base. It is highly unlikely that a government would give the necessary legislative authority to collect the information (and to impose reporting requirements on clinics, physicians, etc.) to a private body.

## Is a Central Data Base Justified?

A central data base (or perhaps a series of provincial data bases) containing personal information is clearly justified to link gamete donors with recipients and their offspring. This data base would be similar to provincial adoption registries.

A central data base linking a donor's medical information (though not his or her identity) with the offspring also seems justifiable. It would clearly benefit the offspring.

It is difficult to assess whether personal information should be stored in a central data base for other purposes, such as research. Admittedly, this would facilitate research, but such a centralized collection of highly personal information also poses a real danger to privacy.

Many people fear the power of governments to collect information about them and misuse it. Personal information relating to NRTs is no exception, particularly where it identifies such sensitive matters as biological parentage and genetic traits. The Privacy Commissioner of Canada, for one, has expressed strong reservations about allowing governments to collect personal genetic information. 95

Any central data base must therefore offer a sense of comfort to those who fear abuses. Whether a government institution can offer this comfort is debatable. An agency independent of government, but with authority to collect necessary personal information, may be a tolerable compromise. The agency would require strict rules on the permissible collection, use, and disclosure of personal information relating to NRTs. Still, such an agency would be a creation of government. The government that made the rules establishing the agency could change the rules to get access to the agency's information. <sup>96</sup> In short, there can be no guarantee of the security of intimate personal information stored in a central data base.

This returns us to the original principle. Collect only the personal information that is truly needed. This greatly diminishes the likelihood of abuse.

## **Regulating the Private Sector**

At present, legal protection against privacy intrusions by the private sector is inconsistent. Professional codes of conduct and legislation offer some protection. The Commission could now consider recommending a broader privacy scheme that would offer protection to personal information relating to NRTs no matter which body — public or private sector — holds the information.

Extending privacy protection to the private sector is not solely an issue arising from the growth of NRTs. In several areas, privacy advocates in Canada are suggesting privacy controls on the private sector like those now regulating some governments.

#### Conclusion

Above all, those working with NRTs must remember to temper their scientific curiosity and their zeal for progress with respect for individual privacy. NRTs are exciting, but they may not be of such seminal importance in the grand scheme of things that other values, such as privacy, must be downplayed or even cast aside.

The assertion of privacy rights may interfere with NRT research and ultimately leave questions unanswered. But those assertions will also protect a value that is crucial to a free society.

## **Appendix 1. Provincial Data Protection Legislation**

# The Ontario Freedom of Information and Protection of Privacy Act, 1987<sup>97</sup>

Under this act, the collection, use, and disclosure of personal information by provincial institutions is regulated much like federal institutions are regulated under the federal Privacy Act. *Provincial institutions* under the Ontario act means provincial government ministries and agencies, boards, commissions, corporations, and other bodies designated as institutions under the regulations to the act. In January 1991, Ontario extended its data protection laws to the municipal sector, through the Municipal Freedom of Information and Protection of Privacy Act, 1989. 98

The Ontario legislation also gives the information and privacy commissioner appointed under the acts the power to conduct inquiries and make orders when a person requests a review of the decision of the head of an institution. The federal act gives no such powers to the federal privacy commissioner. The provincial act prevails over any other provincial act unless that act specifically states otherwise.<sup>99</sup>

Like the federal act, the provincial and municipal acts regulate the right of government institutions to collect personal information. *Personal information* under the provincial and municipal acts means recorded information about an identifiable individual. It includes information relating to the medical history of the individual. <sup>100</sup>

Personal information can be collected for an institution only if the collection is "expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity." <sup>101</sup> In general, personal information must be collected directly from the person, <sup>102</sup> and the person must generally be told the authority for and purpose of the collection. <sup>103</sup>

Both acts require personal information that has been used by an institution to be retained after use for a period stated in the regulations to the acts. <sup>104</sup> They also require the head of the institution to take reasonable steps to ensure that the information is not used unless it is accurate and up-to-date. <sup>105</sup> The head must dispose of personal information according to the regulations. <sup>106</sup>

In general, personal information must not be disclosed to any person other than the person to whom the information relates. However, there are several exceptions to this rule:

- The individual to whom the information relates may consent.
- The information may be disclosed in compelling circumstances relating to the health or safety of an individual.
- A provincial or federal law may expressly authorize the disclosure.

- The information may be released for a research purpose if:
  - the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected, or obtained;
  - 2. the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form; and
  - 3. certain terms and conditions have been approved by the responsible minister (these terms and conditions relate to security and confidentiality, the early removal or destruction of the individual identifier or identifiers associated with the record, and the prohibition of any subsequent use or disclosure of the record in individually identifiable form).
- The information may be disclosed if the disclosure does not constitute an unjustified invasion of personal privacy.
- The information may be disclosed for the purpose for which it was obtained or compiled or for a consistent purpose.

Furthermore, the general rule prohibiting disclosure does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the rule. $^{110}$ 

Like the federal Privacy Act, the provincial and municipal acts provide a person with a right of access to personal information recorded about him or her.<sup>111</sup>

Unlike the federal Privacy Act, the provincial and municipal acts create offences for the improper handling of personal information. For example, it is an offence to wilfully disclose personal information or to maintain a bank of personal information in contravention of the acts. 112

# The Saskatchewan Freedom of Information and Protection of Privacy Act<sup>113</sup>

The act came into force early in 1992. *Personal information* specifically includes information relating to a person's ancestry, place of origin, health care, and health history.<sup>114</sup>

Like the federal and Ontario data protection legislation, the Saskatchewan act regulates the collection, use, and disclosure of personal information held by government institutions — in this case, Saskatchewan government institutions.

Government institutions must not collect personal information unless the information is collected for a purpose that relates to an existing or proposed program or activity of the institution. In general, personal information should be collected directly from the person to whom it relates, and in general, the person should be told the purpose of the collection. The institution must ensure that the personal information it

uses for an administrative purpose is as accurate and complete as possible. 118

Personal information collected by government institutions can be used for the purpose for which the information was obtained or compiled, or for a consistent purpose. It can also be used for a purpose for which the information may be disclosed to the government institution under the main disclosure provision of the act. The person to whom the information relates may consent to other uses.

The general rule on disclosure prohibits a government institution from disclosing personal information without the consent of the person to whom the information relates. However, there are many exceptions. Any other provincial act or regulation may authorize disclosure. Assuming that other acts or regulations do not apply, the Saskatchewan act allows disclosure under circumstances broadly similar to those mentioned in the federal and Ontario legislation. This includes disclosure for the purpose for which the information was collected, disclosure to any person or body for research or statistical purposes, and disclosure in the public interest.

In general, an individual whose information is contained in a government record must be given access to the record. The person can request a correction of the information or require that a notation be made that a correction was requested but not made.  $^{126}$ 

The Saskatchewan act appears to contemplate that other legislation that conflicts with it will override it. For example, the disclosure provision is "subject to any other Act or regulation." Similarly, the act does not prohibit the transfer, storage, or destruction of any record under any other act or regulation. 128

It is an offence for a person to knowingly collect, use, or disclose personal information in contravention of the act. The penalties may be as high as a \$1 000 fine, imprisonment for no more than three months, or both. 129

## The Quebec Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information<sup>130</sup>

The Quebec act, like its federal and provincial counterparts, reflects internationally accepted data protection standards. The act applies to documents kept by a public body in the exercise of its duties, whether the body keeps them itself or through the agency of a third party. Public bodies are defined as the Government (of Quebec), the Conseil éxecutif, the Conseil du Trésor, government departments and agencies, municipal and school bodies, and health and social services. 132

Chapter III of the act deals with the protection of nominative (personal) information. The fundamental principle is that nominative information is confidential. However, there are exceptions: where the disclosure is authorized by the person concerned (a person with parental authority may consent for a minor), and where the nominative information relates to

information obtained in the performance of an adjudicative function by a public body performing quasi-judicial functions. Nominative information is information in any document concerning a person that allows the person to be identified. <sup>134</sup>

Under the act, no person may collect nominative information for a public body if the information is not necessary to carry out the attributions of the body or the implementation of a program it manages. Every person collecting personal information must, among other duties, identify the public body on whose behalf the information is being collected, the categories of persons who will have access to the information, the use of the information, and rights of access. 136

Every public body must see to it that the nominative information it keeps is up-to-date, accurate, and complete, so as to serve the purposes for which it was collected. 137

Like its federal and provincial counterparts, the Quebec act has a general rule preventing a public body from releasing (disclosing) nominative information without the consent of the person concerned. However, like these other acts, there are several exceptions, including release to a person authorized by the Commission d'accès à l'information to use the information for study, research, or statistical purposes. The commission must be satisfied that the intended research use is not frivolous, and that the ends contemplated cannot be achieved without nominative information. It must also be satisfied that the nominative information will be used in a manner that ensures its confidentiality. It

The release of nominative information in certain other situations must be done so as to ensure the confidentiality of the information. $^{141}$ 

All individuals have the right to be informed of the existence of nominative information about themselves in a file and to obtain that information. His information about themselves, are not entitled to be informed of the existence of or to obtain certain nominative information. This is information of a medical or social nature concerning the minor contained in the record held by a health or social services establishment. His

There is a right to request correction of nominative information and a right to have the request stated on the file if the public body refuses to make the correction. 144

Unlike its federal counterpart, the Quebec act generally takes priority over other legislation, and its provisions prevail over any contrary provision of a subsequent general law or special act. The special act prevails, however, if it states that it applies notwithstanding the privacy act. As well, general laws or special acts that were already in existence but were inconsistent with the privacy act ceased to have effect on 31 December 1987. The same rule applied to regulations that were inconsistent. However, five acts of the Quebec National Assembly are exempted from this provision. Their provisions remain in force, even if inconsistent with the privacy act. 147

The act establishes the Commission d'accès à l'information, which has the power to investigate on its own initiative or in response to a complaint. It also has the power to order an errant public body to take measures to meet the conditions set out in the act. <sup>148</sup> If the body does not respond within a reasonable time, the commission may notify the Quebec government or prepare a report on the issue. <sup>149</sup>

The act contains several penalty provisions. The broadest of these makes it an offence to contravene the act, regulations, or any order of the commission. The penalty for a first offence is a fine of \$100 to \$500. On a second offence, the fine increases to a minimum of \$250 and a maximum of \$1000.  $^{150}$ 

# **Appendix 2. Statutory Obligations to Keep Information in Confidence, and Permissible Disclosures**

## **Physicians**

#### Ontario

Two recently enacted statutes govern the professional discipline and regulation of physicians in Ontario. These are the Regulated Health Professions Act<sup>151</sup> and the Medicine Act. <sup>152</sup>

The Regulated Health Professions Act continues the old Health Disciplines Board as the Health Professions Board and provides for the regulation of 21 health professions, including medicine, by their respective colleges. The colleges are to regulate in accordance with the Health Professions Procedural Code contained in a schedule to the act.

Under the act, the Discipline Council of the College of Physicians and Surgeons of Ontario can make regulations defining the professional misconduct of physicians. These regulations have not yet come into force. The college is apparently still relying on a regulation drafted under the old Health Disciplines Act until a new regulation is drafted. The new regulation, expected next year, will likely not differ in substance.

Under the old regulation, *professional misconduct* includes giving information concerning a patient's condition or any professional services performed for a patient to any person other than the patient without the consent of the patient, unless required to do so by law.

#### Nova Scotia

Under the Medical Act, <sup>155</sup> the Provincial Medical Board of Nova Scotia may establish a code of ethics. Disciplinary matters are dealt with by a discipline committee constituted to hear complaints of professional misconduct. *Professional misconduct* is loosely defined in Subparagraph 2(d)(ii) of the act to include "misconduct in a professional respect or conduct unbecoming a medical practitioner."

#### British Columbia

The Medical Practitioners Act<sup>156</sup> permits the Council of the College of Physicians and Surgeons of British Columbia to make rules respecting "the proper professional conduct of those engaged in the practice of medicine in the Province."

#### Manitoba

Under the Medical Act, <sup>157</sup> the Council of the College of Physicians and Surgeons of Manitoba can "establish and maintain professional standards of medical practice." It can also make regulations with respect to "the standards of practice and of ethics" of physicians. The college investigates and reviews complaints involving allegations of "professional misconduct or conduct unbecoming a member."

#### Saskatchewan

Under the Medical Profession Act, 1981, 158 the Council of the College of Physicians and Surgeons of Saskatchewan may make by-laws defining professional misconduct. Under Section 46, a physician may be disciplined for "unbecoming, improper, unprofessional or discreditable conduct." Misconduct includes wilfully betraying a professional secret.

#### Alberta

Under the Medical Profession Act, <sup>159</sup> a physician may be disciplined for "unbecoming conduct." Under Section 36, the investigating committee, the Council of the College of Physicians and Surgeons of Alberta, or the Alberta Court of Appeal may make this determination.

Under Subsection 34(2), "unbecoming conduct" includes "any matter, conduct or thing that in the judgment of the investigating committee, the Council or the Court of Appeal, is such as to be inimical to the best interests of the public or the profession, whether or not the act or conduct is disgraceful or dishonourable."

The act allows physicians to form a "professional corporation," which may then practise medicine under its corporate name. Section 70 states that this does not modify or limit "any law applicable to the confidential or ethical relationships" between a registered practitioner and patient.

#### Prince Edward Island

Under the Medical Act, <sup>160</sup> a physician may be found guilty of professional misconduct if the physician "has committed a breach of any provision of the Act or of the regulations relating to professional misconduct" (the Council of the College of Physicians and Surgeons of P.E.I. can make regulations "defining professional misconduct"). As of 1 January 1991, there has been a vacuum in the field, as no regulations under the Medical Act appear to be in force.

The act, similar to its Alberta counterpart, allows for the practice of medicine to be carried on by corporations. Section 48 states that this does not alter the confidential or ethical relationship between a physician and a patient.

#### New Brunswick

Under the Medical Act, <sup>161</sup> the Council of the College of Physicians and Surgeons of New Brunswick may make regulations defining *professional misconduct*. A physician in New Brunswick may be found guilty of professional misconduct if "he has committed a breach of any provision of [the] Act, the regulations or by-laws." However, there appear to be no provisions on the nature of professional misconduct.

Professional corporations may carry on a practice of medicine. This does not affect the law on the confidential or ethical relationship between a physician and patient.

### Newfoundland

The Medical  ${\rm Act^{162}}$  establishes the Newfoundland Medical Board, which may discipline physicians for professional misconduct.

#### Quebec

Under a directive of Quebec's Professional Code, the Bureau of the Corporation professionnelle des médecins du Québec established its own code of ethics of physicians. The code contains detailed sections outlining the duties of the physician to the patient and the profession. Among other issues, it covers professional secrecy.

## **Non-Physicians**

The P.E.I. Adult Protection Act<sup>164</sup> obliges anyone employed in administering the act to "preserve secrecy with respect to all matters of a confidential nature" received in the course of the person's duties. It is an offence to contravene the act or regulations, with a maximum fine of \$1 000, imprisonment for not more than six months, or both.

In Alberta, information in the record of a nursing home resident is to be treated as private and confidential and may be disclosed only in limited circumstances. <sup>165</sup>

In Ontario, the general rule is that hospitals are not permitted to have persons inspect medical records. <sup>166</sup> There are, however, several exceptions, including disclosures required by law. Furthermore, a hospital board may permit several other disclosures, such as to a patient. <sup>167</sup>

Under the Quebec Health Services and Social Services Act, <sup>168</sup> the medical records of patients in a medical establishment are confidential. No person is to have access to them except with the express or implied consent of the patient, or under a court or coroner's order, or where an act or regulation requires access. A patient is generally entitled to information on the record about himself or herself, unless the information would likely be seriously prejudicial to his or her health, or if the information was given by someone else in such a way that it would be possible to identify that person.

Regulations under the Saskatchewan Hospital Standards Act<sup>169</sup> state that the health record of a patient "shall be the property of the hospital and

shall remain confidential" except where the regulation *obliges* disclosure (for example, for court proceedings or to a coroner)<sup>170</sup> or where the regulation *permits* disclosure.<sup>171</sup> Other examples in the hospital context abound.<sup>172</sup>

In the Northwest Territories, medical records about inpatients or outpatients must be kept secret. Disclosure may (not must) be made in several situations. Similar provisions are found in the Yukon in regulations under the Hospital Insurance Service Ordinance.

## **Disclosure Provisions in Adoption Legislation**

Generally, under provincial adoption statutes, no information relating to an adoption will be released to an adoptee or other interested person as of right. Normally, administrative conditions must be satisfied first. Most notably, some statutes require the consent of the person whom an adopted person wishes to identify before disclosure is permitted.

In recent years some Canadian provinces, such as Ontario, have amended adoption legislation to permit greater access to adoption information. The following summarizes disclosure provisions in the adoption legislation of several provinces.

#### British Columbia

A court, on good cause shown, may permit an applicant to have access to an adoption order.  $^{177}$ 

#### Alberta

A court and the Minister of Family and Social Services may disclose information.  $^{178}$ 

#### Saskatchewan

Documents in the possession of the court relating to an adoption are not available for inspection by any person unless otherwise ordered by the court or requested by the appropriate minister. The minister must receive reasonable notice of the application before the court may grant access to the documents. Adoption documents in the possession of the director or of an agency or person providing adoption services may not be inspected by any person without the prior written consent of the minister. 179

#### Manitoba

The Director of Child and Family Services establishes a registry for the purpose of keeping adoption records. The director may divulge information or facilitate personal contact with the consent of the adult adoptee and the adoptive parents. 180

Section 74 of the Child and Family Services Act provides that an adult adoptee has the right to contact the director who is to make reasonable efforts to contact biological parents and to determine their wishes regarding disclosure of identifying information. However, "the entire tenor of the Act

is to protect the privacy of the adopted individuals and their families and to maintain confidentiality." <sup>181</sup>

#### Ontario

Under the Child and Family Services Act, <sup>182</sup> an "Adoption Disclosure Register" is operated by the Ontario Ministry of Community and Social Services for the purpose of registering persons' requests for the disclosure of identifying information about adoptions. "Identifying information" — information whose disclosure, alone or in combination with other information, will reveal the identity of the person to whom it relates — will be released only in restricted circumstances.

To protect the privacy and confidentiality of those involved in the adoption, the statute requires that before information is disclosed concerning the identity of a party to the adoption, that person's consent must be given. No identifying information is released to adopted children under the age of 18, except when required in exceptional circumstances to protect a person's health, safety, or welfare. Persons 18 years of age or older may obtain identifying information about their birth parents provided the birth parents consent to the disclosure.

The legislation purports to strike a balance between the right of an adoptee to know his or her birth parents and the right of privacy and confidentiality inherent in the adoption process.<sup>183</sup>

#### New Brunswick

Under the Child and Family Services and Family Relations Act, <sup>184</sup> all adoption records are confidential. The minister may divulge identifying information in certain prescribed situations. The act restricts access to identifying information when the person making the request is under the age of majority. In such a case, consents must be given by both the adopting and natural parents.

#### Nova Scotia

Under the Children's Services Act, <sup>185</sup> adoption records are sealed and divulged only by order of the Minister of Community Services or by order of the court.

#### Prince Edward Island

The Adoption  $Act^{186}$  prevents the disclosure of documents in an adoption file without the permission of the court.

## Newfoundland

Under the Adoption Act, <sup>187</sup> the information contained in the "Adopted Children Register" is private and confidential and accessible only by order of the court.

## **Appendix 3. Compulsory Reporting Requirements**

The following are examples of legislation requiring information received in confidence to be reported to government (usually health) officials.

Under the federal Aeronautics Act, <sup>188</sup> a physician examining a member of a flight crew or an air traffic controller must report that person to Transport Canada officials if the physician thinks the patient has a medical or optometric condition likely to constitute a "hazard to aviation safety."

Provincial health legislation imposes a duty on physicians (and sometimes others, such as school principals, landlords, etc.) to report the incidence of communicable diseases or diseases dangerous to the public health. In some provinces, highway traffic legislation obliges physicians to inform the registrar of motor vehicles if a patient suffers from a medical condition that makes it dangerous to drive. Other provinces make reporting voluntary. In the suffers of the provinces make reporting voluntary.

The Ontario Child and Family Services Act<sup>192</sup> requires a person who believes on reasonable grounds that a child is or may be in need of protection to report the belief and the information on which it is based to a children's aid society. This duty to report also applies to persons who perform professional or official duties, including health care professionals—for example, physicians, nurses, dentists, pharmacists, and psychologists. <sup>193</sup> If they have reasonable grounds to suspect present or past child abuse, they must report the information to a society. The obligation to report applies "although the information reported may be confidential or privileged." <sup>194</sup>

No legal action may be started against a person reporting as required unless the person acts maliciously or without reasonable grounds for the suspicion or belief. It is an offence for a professional to fail to report. 195

The P.E.I. Family and Child Services Act<sup>196</sup> requires anyone with reasonable and probable cause to suspect the abuse, desertion, or abandonment of a child to report the circumstances to the appropriate official. The person reporting is protected from civil action for any matter contained in the report or anything done in good faith to help the investigation.<sup>197</sup> Any person who fails to comply with this requirement is guilty of an offence and is liable to a fine not exceeding \$300.

The Ontario Nursing Homes Act<sup>198</sup> requires persons who have reasonable grounds to suspect that a resident of a nursing home has suffered or may suffer harm to report this to the director named under the act. This duty also applies to a legally qualified medical practitioner or a person registered under the Health Disciplines Act (since repealed), even if the information on which a report may be based is confidential.<sup>199</sup> It is an offence under the act not to report this suspicion, with a possible penalty of not more than \$5 000 for a first conviction and not more than \$10 000 for each subsequent offence.<sup>200</sup>

The Neglected Adults Welfare Act, 1973 of Newfoundland<sup>201</sup> requires anyone with information leading them to believe that an adult is a "neglected adult" to inform the appropriate authorities. This duty applies even if the information is confidential. It is an offence not to report.

The Nova Scotia Adult Protection Act<sup>202</sup> imposes a similar obligation,

The Nova Scotia Adult Protection Act<sup>202</sup> imposes a similar obligation, again even if the information is confidential. The person providing the information is protected from liability unless the information is given maliciously or without reasonable and probable cause.<sup>203</sup> It is an offence not to report.<sup>204</sup>

The New Brunswick General Regulation under the Public Hospitals Act<sup>205</sup> requires any person who works in a hospital and who has reason to believe that a patient has died from any of a number of causes, including negligence or malpractice, to notify a coroner.

In Ontario, physicians who know or suspect that a person being admitted to a hospital on the physician's order is or may become dangerous to himself or herself or to another person must notify the hospital administrator about the person. Similarly, physicians or dentists who know or suspect that their patient is suffering from an infectious disease must notify an infection control officer or the hospital administrator.

The Alberta Cancer Board may require a physician to furnish it with a report containing the name and address of, and a description of the services provided to, a patient who is, was, may be, or may have been suffering from cancer.<sup>208</sup>

The P.E.I. Adult Protection Act<sup>209</sup> permits, but does not oblige, any person who has reasonable grounds for believing that a person is in need of assistance to report to the appropriate authorities. A person who makes such a report is protected from civil liability unless the reporting was done maliciously or without reasonable and probable cause.<sup>210</sup>

The Nova Scotia Hospitals Act<sup>211</sup> also permits, but does not oblige, the reporting of those suffering from psychiatric disorders. If a person has reasonable grounds to believe someone is suffering from a psychiatric disorder and is a danger to themselves or to others, that information may be given to a provincial court judge.

## **Notes**

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- 1. This was the formulation made famous in an 1890 article by two young U.S. jurists, quoting Judge Cooley, author of an 1888 text on tort law: Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193, discussed in G.H.L. Fridman, *The Law of Torts in Canada*, vol. 2 (Toronto: Carswell, 1990), 195.
- 2. Fridman, Law of Torts, 191 [references to footnotes omitted]. See also A. Schafer, "Privacy: A Philosophical Overview," in Aspects of Privacy Law: Essays in Honour of John M. Sharp, ed. D. Gibson (Toronto: Butterworths, 1980), 4: "It is

surprisingly difficult to give a straightforward definition of the concept of privacy. Despite innumerable attempts by contemporary philosophers and jurists to formulate a definition, the concept has remained elusive. One can discover no consensus in either the legal or the philosophical literature."

- 3. A more formal definition might be that adopted in the Krever Report: "The claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others": Ontario, Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario, Report (The Hon. Mr. Justice Horace Krever, Chairman) (Toronto: Queen's Printer, 1980), 6; cited in B.M. Knoppers, "Confidentiality and Accessibility of Medical Information: A Comparative Analysis," Revue de Drott de l'Université de Sherbrooke 12 (1982), 398. The definition used by Mr. Justice Krever is that of A.F. Westin in his text Privacy and Freedom (New York: Atheneum, 1967), 7. In 1989, the United States Supreme Court described privacy as follows: "Both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person": U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, (1989), 109 S. Ct. 1468 at 1476; cited in J.T. McCarthy, The Rights of Publicity and Privacy (New York: Clark Boardman, 1991) (Release #5, 2/91), 1-4.
- 4. Of course, medical or research interventions into a person's body without consent can also be considered violations of privacy. This report assumes, however, that the rule prohibiting such interventions without informed consent is sufficiently well established that this topic need not be addressed further here.
- 5. In several countries, general data protection legislation (such as Canada's federal Privacy Act) regulates the collection, use, and disclosure of personal information and gives rights of access to persons about whom information is collected. Canadian data protection laws are discussed in Part 3 (Federal and Provincial Data Protection Legislation) of this study.
- 6. L.E. Rozovsky and F.A. Rozovsky, *The Canadian Law of Patient Records* (Toronto: Butterworths, 1984), 78.
- 7. Ibid.
- 8. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter].
- 9. Sometimes, this rule is made explicit by including it in legislation. For example, s. 8(2) of the federal Privacy Act, R.S.C. 1985, c. P-21 [hereinafter Privacy Act], states that its disclosure provisions are "subject to any other Act of Parliament," which could include other specific and general acts. Other times, an apparent conflict between specific and general statutory provisions may be resolved by interpreting the general provision as not applying to the situation governed by the specific provision, to the extent of the inconsistency. In effect, the specific overrides the general. The Latin phrase *generalia specialibus non derogant* expresses this general rule: when two or more statutes of the same jurisdiction are applicable to a given factual situation and they conflict, the more specific statute takes precedence over the general statute. See also E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), 229.
- 10. Such as s. 168 of the Quebec Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, R.S.Q., c. A-2.1, which

states: "The provisions of this Act prevail over any contrary provision of a subsequent general law or special Act unless the latter Act expressly states that it applies notwithstanding this Act" and the Quebec Charter of Human Rights and Freedoms (R.S.Q., c. C-12), whose privacy protections prevail over provisions in any other provincial legislation unless that legislation states that it applies despite the Charter.

- 11. Sometimes, however, the rules in professional codes of conduct are in effect "incorporated" into legislation governing professional bodies. The rules in the professional codes will prevail, as they are seen as part of the legislation. Even if its code of conduct is not incorporated in legislation, a professional body may be able to discipline its members for a breach of the code.
- 12. The person could complain under the Charter if a government agent was collecting the information.
- 13. United Nations, Office of Public Information, *The International Bill of Human Rights* (New York: U.N., 1978), 4-9. See generally I. Brownlie, ed., *Basic Documents in International Law*, 2d ed. (Oxford: Clarendon Press, 1972), 144.
- 14. United Nations, International Bill of Human Rights, art. 12(3).
- 15. The OECD was set up by a convention signed in Paris in December 1960. The convention provided that the OECD was to be a vehicle for promoting economic growth and expanding world trade. The OECD has 24 members, including Canada, the United States, and most West European countries.
- 16. OECD, Guidelines for the Protection of Privacy and Transborder Flows of Personal Data (Paris: OECD, 1980).
- 17. Ibid., 5.
- 18. Paragraph 1(b).
- 19. Under s. 33 of the Canadian Charter, *supra*, note 8, a legislature of a province may expressly declare in legislation that the legislation shall operate notwithstanding certain sections of the Charter guaranteeing fundamental freedoms and legal and equality rights.
- 20. Pohoretsky v. The Queen (1987), 33 C.C.C. (3d) 398 (S.C.C.).
- 21. R. v. Simmons (1988), 45 C.C.C. (3d) 296 (S.C.C.).
- 22. R. v. Wong (1990), 60 C.C.C. (3d) 460 (S.C.C.).
- 23. R. v. McComber (1988), 44 C.C.C. (3d) 241 (Ont. C.A.).
- 24. Cloutter v. Langlois (1990), 53 C.C.C. (3d) 257 (S.C.C.).
- 25. (1988), 45 C.C.C. (3d) 244.
- 26. (1988), 37 C.C.C. (3d) 449.
- 27. Canada, Privacy Commissioner of Canada, Entrenching a Constitutional Privacy Right for Canadians: A Submission to the Special Joint Committee on a Renewed Canada (Ottawa: Privacy Commissioner of Canada, 1991), 9.
- 28. S. 52(1) of the Charter states that any law inconsistent with the Constitution (which includes the Charter) is of no force or effect.
- 29. The Charter, of course, applies to acts of provincial legislatures.

- 30. Unlike the constitutional rights contained in the Canadian Charter of Rights and Freedoms, however, those of the Quebec Charter are not "entrenched."
- 31. Charter of Human Rights and Freedoms, supra, note 10, s. 52. See the discussion of the Quebec Charter in D. Flaherty, "Entrenching a Constitutional Right to Privacy for Canadians: A Background Paper," study prepared for the Office of the Privacy Commissioner of Canada (Ottawa: 1991), 10-11.
- 32. Supra, note 9. Earlier, limited data protection provisions were found in the Canadian Human Rights Act (S.C. 1976-77, c. 33). The Privacy Act that came into force in 1983, however, was the first comprehensive federal data protection legislation.
- 33. The Freedom of Information and Protection of Privacy Act, S.B.C. 1992, c. 61.
- 34. The U.S. Privacy Act does not apply to the private sector either. Quebec, however, has introduced legislation to regulate the collection, use, and disclosure of personal information by the private sector. The legislation will also give individuals the right to be informed of the existence of personal information files held by a private sector business and the right to request correction of the information: Bill 68, An Act Respecting the Protection of Personal Information in the Private Sector, 6 December 1992.

35. S. 3.

- 36. See Canada, Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: Privacy Commissioner of Canada, 1990), 22-23, and Canada, Privacy Commissioner of Canada, *AIDS and the Privacy Act* (Ottawa: Privacy Commissioner of Canada, 1989), 19.
- 37. Although it might violate the Charter and be declared "of no force or effect."
- 38. S. 5(1) of the act reads:

A government institution shall, wherever possible, collect personal information that is intended to be used for an administrative purpose directly from the individual to whom it relates except where the individual authorizes otherwise or where personal information may be disclosed to the institution under subsection 8(2).

- 39. Ibid. For example, personal information collected by one department to determine the health of a person could be disclosed to a second department for a use consistent with determining the health of the person. The second department would not be required to collect this information directly from the person.
- 40. Ibid., s. 3, definition of administrative purpose.
- 41. SOR/83-508. S. 4(1) reads:

Personal information concerning an individual that has been used by a government institution for an administrative purpose ... shall be retained by the institution

(a) for at least two years following the last time the personal information was used for an administrative purpose unless the individual [concerned] consents to its disposal; and

- (b) where a request for access to the information has been received, until such time as the individual has had the opportunity to exercise all his rights under the Act.
- 42. See s. 8(2) for the precise language.
- 43. For example, the Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 47(3) states that information received by a conciliator trying to settle a complaint is confidential and may not be disclosed unless the person who gave the information consents. S. 33 sets out the duty to comply with security requirements relating to information and not to disclose it in certain circumstances. S. 17 of the Statistics Act, R.S.C. 1985, c. S-19, prohibits anyone sworn to secrecy under the act from disclosing any information obtained under the act if it is possible to relate the particulars obtained from any individual return to any identifiable person. Other examples include the Unemployment Insurance Act, R.S.C. 1985, c. U-1, s. 96, and the Income Tax Act, S.C. 1970-71-72, c. 63, s. 241.
- 44. However, they would not take precedence over the Charter and could be declared of no force or effect by a court if they were inconsistent with the Charter. With that offending legislation out of the way, the Privacy Act disclosure provisions would again apply.
- 45. S. 12(1).
- 46. S. 12(2).
- 47. Specifically, s. 12(2) permits the person to do the following:
  - (a) request correction of the personal information where the individual believes it contains an error or omission;
  - (b) require that a notation be attached to the information indicating any correction requested but not made; and
  - (c) require notifying any person or body to whom the information has been disclosed within the past two years of the correction or notation.
- 48. Although s. 68 makes it an offence to obstruct the Privacy Commissioner in performing duties under the act.
- 49. The Ontario Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 [hereinafter Ontario Privacy Act], and the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 [hereinafter Municipal Privacy Act]; the Quebec Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, supra, note 10 [hereinafter Quebec Access to Documents Actl; the Saskatchewan Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. F-22.01 [hereinafter Saskatchewan Privacy Act]. British Columbia's recently enacted comprehensive data protection legislation, The Freedom of Information and Protection of Privacy Act, supra, note 33, is expected to come into force in the autumn of 1993. As well, some provincial access to information legislation now in force in various provinces offers limited data protection. For example, Nova Scotia's Freedom of Information Act, S.N.S. 1990, c. 11, limits the ability of provincial departments and ministers to disclose personal information (s. 5), provides a person with a right of access to his or her own personal information held by the provincial government (s. 4), and permits the person to request the correction of personal information that may be inaccurate (s. 9). Newfoundland's Freedom of Information Act, S.N. 1981, c. 5, also permits access to one's own personal information held by the provincial government (ss. 4 and 10) and restricts

access by others to one's personal information held by government (s. 10). New Brunswick's Right to Information Act, S.N.B. 1978, c. R-10.3, states that there is no right to information under the act where its release would reveal personal information concerning another person (s. 6).

- 50. Quebec Access to Documents Act, *supra*, note 10, s. 168; Ontario Privacy Act, *supra*, note 49, s. 67. However, federal and provincial (except in Quebec) legislation does not prevail over the Charter. Furthermore, there are some exceptions. For example, the Quebec legislation states that it does not prevail over certain named statutes.
- 51. Privacy Act, supra, note 9, s. 8(2)(j).
- 52. Ontario Privacy Act, *supra*, note 49, s. 21(1)(e). A similar provision on disclosure for research, with slightly different conditions, is found in the Municipal Privacy Act, *supra*, note 49, s. 14(1)(e).
- 53. Saskatchewan Privacy Act, supra, note 49, s. 29(2)(k).
- 54. Quebec Access to Documents Act, supra, note 10, s. 59(5).
- 55. S. 125.
- 56. P. Burns, "Privacy and the Common Law: A Tangled Skein Unravelling?" in Aspects of Privacy Law: Essays in Honour of John M. Sharp, ed. D. Gibson (Toronto: Butterworths, 1980), 22.
- 57. J.G. Fleming, The Law of Torts, 4th ed. (Sydney: Law Book, 1971), 1.
- 58. Fridman, *supra*, note 1, 192; see also P. Burns, "Privacy and the Common Law," *supra*, note 56, 22, and A.M. Linden, *Canadian Tort Law*, 3d ed. (Toronto: Butterworths, 1982), 50-51.
- 59. R.S.B.C. 1979, c. 336, s. 1(1).
- 60. The Privacy Act, R.S.S., 1978, c. P-24, s. 2.
- 61. The Privacy Act, S.N. 1981, c. 6, s. 3(1).
- 62. The Privacy Act, C.C.S.M., P125.
- 63. The Saskatchewan act, *supra*, note 60, s. 11 and the Newfoundland act, *supra*, note 61, s. 12 both state that they apply to the Crown.
- 64. An Act to Add the Reformed Law of Persons, Successions and Property to the Civil Code of Québec, S.Q. 1987, c. 18, art. 35.
- 65. Ibid., art. 36(4).
- 66. (1990), 75 D.L.R. (4th) 758 at 761 (Ont. Ct. Gen. Div.), Craig J.
- 67. (1990), 69 D.L.R. (4th) 755 at 757-58 (Alta. Q.B.).
- 68. (1981), 128 D.L.R. (3d) 193 (S.C.C.).
- 69. Re Inquiry into the Confidentiality of Health Records in Ontario (1979) 98 D.L.R. (3d) 704 at 714 (Ont. C.A.).
- 70. G. Sharpe, *The Law and Medicine in Canada*, 2d ed. (Toronto: Butterworths, 1987), 223-24. Though the text is already dated, the commentary appears to remain relevant.
- 71. Canadian Medical Association, Code of Ethics (Ottawa: CMA, 1982).

- 72. S.S. 1980-81, c. M-10.1.
- 73. R.S.P.E.I. 1988, c. A-5, s. 30.
- 74. R.S.S. 1978, c. H-10.
- 75. R.R.S. 1979, Reg. 331, s. 16(1).
- 76. Ibid., s. 16(2).
- 77. Ethical principles relating to confidentiality are discussed in the context of genetics in a study paper prepared for the Law Reform Commission of Canada. B.M. Knoppers, Human Dignity and Genetic Heritage (Ottawa: Law Reform Commission of Canada, 1991), 60.
- 78. Ibid.
- 79. Ibid., 62.
- 80. However, as Professor Knoppers argues, maintaining confidentiality may sometimes create the risk of serious harm to others and therefore warrant breaching confidentiality; ibid., 63.
- 81. Canadian Medical Association, "Confidentiality, Ownership and Transfer of Medical Records," Canadian Medical Association Journal 133 (1985): 142A.
- 82. Ibid. The policy contains the following statement, which may now have been rendered incorrect by a June 1992 Supreme Court of Canada decision on the rights of patients to have access to their medical records:

Patients have a right to information contained in their records but not to the documents themselves. The first consideration of the physician is the well-being of the patient, and discretion must be used when conveying information contained in a medical record to a patient. This medical information often requires interpretation by a physician or other health care professional. Other disclosures of information contained in medical records to third parties (eg. physician-to-physician transfer, lawyer, insurance adjuster) require written patient consent or a court order.

- 83. Medical Research Council of Canada, Guidelines on Research Involving Human Subjects (Ottawa: Minister of Supply and Services Canada, 1987).
- 84. Ibid., xi.
- 85. Ibid., 37-38.
- 86. Council for International Organizations of Medical Sciences, *International Guidelines for Ethical Review of Epidemiological Studies* (Geneva: CIOMS, 1991). CIOMS operates under the auspices of the World Health Organization and UNESCO. Its predecessor was formed in 1949, and CIOMS took its present name in 1952. Its goals include promoting international activities in the field of medical sciences and serving the scientific interests of the international biomedical community in general.
- 87. See the disclosure provisions described in Part 3 (Other Sources of Obligations) of this study.
- 88. R.S.C. 1985, c. A-2, s. 6.5.
- 89. OECD, Guidelines for the Protection of Privacy, supra, note 16.
- 90. The federal Privacy Act sets out rules on the collection, use, and disclosure of personal information by federal government institutions. Similar provincial legis-

lation in Ontario, Quebec, and Saskatchewan governs provincial institutions, as will the British Columbia data protection legislation after it is proclaimed in force. See the discussion in Part 3 of this study.

- 91. Professional codes of conduct and specific legislation, such as that governing hospitals, offer some privacy protection. However, there are gaps.
- 92. Such a scheme would be viable only if sufficient numbers of donors are available who would not object to having their identity disclosed.
- 93. There may of course be other considerations, such as the ethics of using information for research even anonymous information without informing the research subjects that the research is being carried out.
- 94. See the discussion on the disclosure of personal information for research under federal and provincial data protection legislation in Part 3 of this study. In some cases, such as under the statutory tort regimes in British Columbia, Saskatchewan, and Newfoundland, the use of personal information for research without consent could violate the legislation. Health care professionals might also violate professional codes of conduct by disclosing such information without consent unless the law requires or permits them to do so. Government institutions are also subject to the Canadian Charter of Rights and Freedoms. Their actions in disclosing personal information for research could violate the Charter, even if legislation authorizes the disclosure. In such a case, the legislation could become null and void if challenged in court.
- 95. See Canada, Privacy Commissioner of Canada, *Genetic Testing and Privacy* (Ottawa: Privacy Commissioner of Canada, 1992), 35-42, 57-59.
- 96. Of course, one could challenge the actions of the government as violating Charter privacy protections. There is no guarantee, however, that a court would support the challenge and prevent the government from getting access to the information.
- 97. Ontario Privacy Act, supra, note 49.
- 98. Municipal Privacy Act, supra, note 49.
- 99. Ontario Privacy Act, supra, note 49, s. 67(2).
- 100. Ibid., s. 2; Municipal Privacy Act, s. 2.
- 101. Ontario Privacy Act, s. 38(2); Municipal Privacy Act, s. 28(2).
- 102. Ontario Privacy Act, s. 39(1); Municipal Privacy Act, s. 29(1).
- 103. Ontario Privacy Act, s. 39(2); Municipal Privacy Act, s. 29(2).
- 104. Ontario Privacy Act, s. 40(1); Municipal Privacy Act, s. 30(1).
- 105. Ontario Privacy Act, s. 40(2); Municipal Privacy Act, s. 30(2).
- 106. Ontario Privacy Act, s. 40(4); Municipal Privacy Act, s. 30(4).
- 107. Ontario Privacy Act, s. 21(1); Municipal Privacy Act, s. 14(1).
- 108. Ontario Privacy Act, ss. 21 and 41; Municipal Privacy Act, ss. 14 and 32.
- 109. Ontario Privacy Act, s. 21(1)(e). A similar provision on disclosure for research, with slightly different conditions, is found in the Municipal Privacy Act, s. 14(1)(e).
- 110. Ontario Privacy Act, s. 23; Municipal Privacy Act, s. 16.

- 111. Ontario Privacy Act, ss. 47-49; Municipal Privacy Act, ss. 37-38.
- 112. Ontario Privacy Act, s. 61; Municipal Privacy Act, s. 48. The fine for a violation may be as high as \$5 000.
- 113. Supra, note 49.
- 114. S. 24(1).
- 115. S. 25.
- 116. S. 26(1).
- 117. S. 26(2).
- 118. S. 27.
- 119. S. 28.
- 120. Ibid.
- 121. S. 29(1).
- 122. S. 29(2).
- 123. S. 29(2)(k). Before disclosure is permitted to researchers, the head of the government institution must be satisfied that the purpose for which the information is to be disclosed is not contrary to the public interest and cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates; and obtain from the researcher a written agreement not to make a subsequent disclosure of the information in a form that could reasonably be expected to identify the individual to whom it relates.
- 124. S. 29(2)(o). The head of the institution may disclose personal information for any purpose if the head thinks that the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure or disclosure would clearly benefit the individual to whom the information relates.
- 125. S. 31(1).
- 126. S. 32(1).
- 127. S. 29(2).
- 128. S. 4(e).
- 129. S. 68(1).
- 130. Supra, note 10.
- 131. S. I.
- 132. S. 3 states that "the Lieutenant Governor, the National Assembly, agencies whose members are appointed by the Assembly, and every person designated by the Assembly to an office under its jurisdiction ... are classed as public bodies." Ss. 4 to 7 explain further what is meant by government bodies.
- 133. S. 53.
- 134. S. 54.
- 135. S. 64.
- 136. S. 65.
- 137. S. 72.

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- 138. S. 59.
- 139. S. 59(1-9).
- 140. S. 125.
- 141. S. 69.
- 142. S. 83.
- 143. Ibid.
- 144. Ss. 89, 91.
- 145. S. 168.
- 146. S. 169.
- 147. S. 170.
- 148. S. 128.
- 149. S. 133.
- 150. Ss. 158-162 set out offences and penalties. S. 162 is the general penalty provision.
- 151. An Act Respecting the Regulation of Health Professions and Other Matters Concerning Health Professions, S.O. 1991, c. 18.
- 152. An Act Respecting the Regulation of the Profession of Medicine, S.O. 1991, c. 30. Both this and the Regulated Health Professions Act received Royal assent on 25 November 1991. They replace the Health Disciplines Act, R.S.O. 1980, c. 196.
- 153. Ss. 51(1)(c) and 95(1)(24).
- 154. O. Reg. 448/80, s. 27(22).
- 155. R.S.N.S. 1989, c. 278.
- 156. R.S.B.C. 1979, c. 254.
- 157. R.S.M. 1987, c. M90.
- 158. Supra, note 72.
- 159. R.S.A. 1980, c. M-12.
- 160. R.S.P.E.I. 1988, c. M-5.
- 161. S.N.B. 1981, c. 87.
- 162. S.N. 1974, No. 119.
- 163. R.S.Q. 1977, c. 26, s. 87.
- 164. Supra, note 73, s. 30.
- 165. Nursing Homes Act, S.A. 1985, c. N-14.1, s. 27; see also the Nursing Homes General Regulation under the Nursing Homes Act, Alta. Reg. 232/85, s. 12, which elaborates on the obligation of confidentiality and the exceptions to it.
- 166. O. Reg. 518/88, under the Public Hospitals Act, R.S.O. 1990, c. P.40., s. 21.
- 167. S. 21(4).
- 168. An Act Respecting Health Services and Social Services, R.S.Q., c. S-5, s. 7.
- 169. Supra, note 74.

170. R.R.S. 1979, Reg. 331, s. 16(1).

171. Ibid., s. 16(2).

172. A general obligation of confidentiality, coupled with a list of mandatory or permissible disclosures, or both, can be found in the P.E.I. Hospital Management Regulations, R.R.P.E.I., c. H-10, s. 47; the Alberta Health Care Insurance Act, R.S.A. 1980, c. A-24, s. 13; the Alberta Hospitals Act, R.S.A. 1980, c. H-11, s. 40; the Alberta Mental Health Act, S.A. 1988, c. M-13.1, s. 17; The Mental Health Act of Manitoba, R.S.M. 1987, c. M110, s. 26; the Nova Scotia Hospitals Act, R.S.N.S. 1989, c. 208, s. 71; and, in Saskatchewan, The Mental Health Services Act, S.S. 1984-85, c. M-13.1, s. 38. Sometimes the obligation to disclose comes from another piece of legislation. In Alberta, for example, the patient advocate has the right to obtain the medical records of a patient from the board of a mental health facility: Patient Advocate Regulation, Alta. Reg. 310/89, s. 5. The patient advocate is generally obliged not to disclose the information, s. 6.

173. R.R.N.W.T. 1980, Reg. 274, s. 75.

174. S. 75.

175. R.R.Y.T. 1977, Reg. 130, s. 75.

176. For example, the Ontario Child and Family Services Act, R.S.O. 1990, c. C.11.

177. Adoption Act, R.S.B.C. 1979, c. 4, s. 15 [am. 1985, c. 13, s. 1].

178. Child Welfare Act, S.A. 1984, c. C-8.1.

179. Adoption Act, S.S. 1989-90, c. A-5.1, s. 21.

180. Child and Family Services Act, S.M. 1985-86, c. 8.

181. Phelps v. Director of Child and Family Services (1987), 51 Man. R. (2d) 64 at 65 (Man Q.B.), Helper J.

182. Supra, note 176, s. 161 and following.

183. Ontario, Ministry of Community and Social Services, *Adoption Disclosure Services* (Toronto: MCSS, 1991).

184. S.N.B. 1980, c. C-2.1.

185. R.S.N.S. 1989, c. 68, s. 28.

186. R.S.P.E.I 1974, c. A-1.

187. S.N. 1972, No. 36, s. 20, as am. S.N. 1977, c. 63, s. 1.

188. Supra, note 88, s. 6.5.

189. See the Ontario Act Respecting the Protection and Promotion of the Health of the Public, S.O. 1983, c. 10, ss. 25, 26; the Nova Scotia Health Act, R.S.N.S, 1989, c. 195, ss. 64, 92; regulations made under the Manitoba Public Health Act, R.S.M. 1987, c. P210; regulations made under the New Brunswick Health Act, R.S.N.B. 1973, c. H-2; the Saskatchewan Venereal Disease Prevention Act, R.S.S. 1978, c. V-4, s. 4; regulations made under the Saskatchewan Public Health Act, R.S.S. 1978, c. P-37; the Alberta Public Health Act, S.A., 1991, c. P-27.1; the British Columbia Health Act, R.S.B.C. 1979, c. 161, s. 88; regulations made under the Prince Edward Island Public Health Act, R.S.P.E.I. 1988, c. P-30.

- 190. See, for example, the Manitoba Highway Traffic Act, S.M. 1985-86, c. H60, s. 157; the Prince Edward Island Highway Traffic Act, R.S.P.E.I. 1988, c. H-5, s. 233; the British Columbia Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 221.
- 191. See, for example, the Nova Scotia Motor Vehicle Act, R.S.N.S, 1989, c. 292, s. 279(1)(7); the Saskatchewan Vehicle Administration Act, R.S.S. 1978, c. V-2.1, s. 94; the Alberta Motor Vehicle Administration Act, S.A. 1991, c. M-22, s. 14(1)(2).
- 192. Supra, note 174, s. 72(a).
- 193. S. 72.
- 194. S. 72(7).
- 195. S. 85(1)(b).
- 196. R.S.P.E.I. 1988, c. F-2, s. 14(1).
- 197. S. 14(4).
- 198. R.S.O. 1990, c. N.7, s. 25(1).
- 199. S. 25(5).
- 200. S. 36.
- 201. S.N. 1973, No. 81, s. 4.
- 202. R.S.N.S. 1989, c. 2, s. 5.
- 203. S. 5.
- 204. S. 17.
- 205. N.B. Reg. 84-212, s. 49 under the Public Hospitals Act, R.S.N.B. 1973, c. P-23.
- 206. O. Reg. 518/88, under the Public Hospitals Act, supra, note 166, s. 13(1).
- 207. S. 13(2).
- 208. Cancer Programs Act, R.S.A. 1980, c. C-1, s. 12. The board itself must treat the information as confidential (s. 12).
- 209. Supra, note 73, s. 4(1).
- 210. S. 4(4).
- 211. Supra, note 172, s. 36.

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# Reproductive Technology: Is a Property Law Regime Appropriate?

M.M. Litman and G.B. Robertson



#### **Executive Summary**

Is property law an appropriate regulatory device for determining the legal issues generated by the new reproductive technologies? In particular, can reproductive materials (such as gametes) and products of conception (such as zygotes, embryos, and fetuses) be owned, and, if so, by whom? These are the questions examined by this report.

The first consideration in trying to answer these questions is the legal status of the fetus and embryo. The authors take a detailed look at how criminal law, private law, human rights legislation, and child welfare legislation have treated fetuses and embryos in terms of their personhood. The second consideration is the legal concept of property: How is it legally defined? Can these definitions logically and legally be applied to humans, their bodies or body parts, reproductive materials, or products of conception? Of particular interest are the concepts of quasi-property and property sut generts (unique).

Having examined definitions and court cases that have grappled with such issues, the authors consider the legal implications of applying property law to reproductive materials.

The analysis concludes that property law contains sufficient flexibility to accommodate the various policy concerns that exist in this area.

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Nevertheless, the report recommends that reproductive material not be characterized as property. Instead, it recommends that a special legislative regime be enacted to reflect policy choices with respect to individual issues, and that the legislation characterize reproductive material as *sut generis*.

#### Introduction

This report considers whether property law is an appropriate regulatory device for determining legal issues generated by the new reproductive technologies. These issues are numerous, diverse, unprecedented, and profound in their import. The primary focus of the report is whether reproductive materials such as gametes and products of conception (including zygotes, embryos, and fetuses) are susceptible of ownership, and, if so, who their owners are. Even if such materials are property, because of their unique and perhaps special nature it is crucial to consider whether standard property rules or a specially tailored proprietary regime should regulate their existence. If reproductive material is not property, what legal framework is appropriate to sort out the range of issues that this new technology presents?

Property law cannot apply to reproductive materials that have evolved to the stage of an existing human being. Hence, it is essential to consider at what point in its development the conceptus acquires the legal status of personhood under Canadian law. This issue is examined in the section entitled "The Legal Status of the Embryo and Fetus," which concludes that Canadian courts have been extremely reluctant to recognize the embryo or fetus as a person prior to birth.

Since in law the conceptus is not a person, this leads to the question of whether it is property. A considered response to this question begins with an analysis of what property is in a legal sense. "The Legal Concept of Property" explores the general theory of property. Such an analysis is undertaken with a view to informing the Commission of the feasibility of applying a property framework to reproductive products and the implications that flow from such a framework.

The section "Reproductive Material as Property" discusses existing case law, which indicates that, at least for certain purposes, some courts have been willing to characterize reproductive material as property. These cases emanate exclusively from the United States. These and other non-Canadian cases are examined in this report despite its emphasis on the Canadian perspective. Because of the absence of Canadian jurisprudence on this issue, U.S. law and the law of Commonwealth jurisdictions, especially jurisdictions such as the United Kingdom, Australia, and New Zealand, do have persuasive value in Canadian law and are likely to be referred to and used.<sup>2</sup>

The next section discusses the implications of applying a property analysis to reproductive material, and evaluates whether such an analysis is appropriate. The final section concludes with some recommendations for the development of an appropriate legal regime for the regulation of legal issues in this area.

# The Legal Status of the Embryo and Fetus

If products of conception are persons they cannot be property under the control of others.<sup>3</sup> Thus, this section examines the relevant case law dealing with the legal status of the fetus and embryo in Canada. That issue has arisen in a number of different legal contexts and has tended to be addressed on an ad hoc basis. As one would expect, particularly in an area as sensitive as this, the courts have often been influenced by policy factors, the nature of these factors varying with the particular context in which the issue has arisen. It is clear that Canadian courts have been unwilling to regard a fetus or embryo as a person. They have done so only in very limited circumstances and for limited purposes.

#### **Criminal Law**

Criminal law is the area in which Canadian law has most clearly repudiated the notion that a fetus and embryo have the legal status of human beings. The Criminal Code<sup>4</sup> provides that "a child becomes a human being," for the purposes of the criminal law, "when it has completely proceeded, in a living state, from the body of its mother." Thus, by the express terms of this section, a fetus is not a human being for the purposes of the criminal law.6 However, many sections of the Criminal Code use the term "person" rather than "human being," but without defining the term. Is a fetus a person for criminal law purposes? In R. v. Sullivan<sup>7</sup> the Supreme Court of Canada held that it is not.8 The case involved two midwives who were prosecuted after they attempted to deliver a baby who died while still in the birth canal. Affirming the decision of the British Columbia Court of Appeal,9 the Supreme Court held that the accused could not be convicted of criminal negligence causing the death of another person because the law does not recognize a fetus as a person. 10 The Supreme Court concluded that "person," as used in the Criminal Code, is synonymous with "human being" and thus does not include a fetus. It is interesting that the court did not articulate any policy reasons for arriving at this conclusion. Rather, it focussed on the specific language of the Criminal Code and on the absence of any credible explanation as to why Parliament would have intended "person" to have a different meaning from "human being."

#### **Private Law**

In areas of private law (such as succession and property), there exists a legal fiction that a child who is born alive is deemed to have been alive while *en ventre sa mère*, so long as it is in the child's interest to have this fiction applied. For example, if a testator provides in his will that his estate is to be divided equally among his children, and his wife is pregnant at the date of his death, the posthumous child will be deemed to have been alive at the date of its father's death<sup>11</sup> so as to benefit under the will.<sup>12</sup> A similar provision is contained in intestate succession legislation, that is, legislation dealing with succession to the estate of a person who dies without leaving a valid will. For example, the legislation in Alberta provides that: "Descendants and relatives of the intestate, conceived before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him."<sup>13</sup>

The policy underlying this approach is the desire to give effect to the (presumed) intention of the deceased. It is assumed that the deceased would have wanted the posthumous child to benefit; thus, to achieve this, the law deems the child to have been alive at the deceased's death. As noted above, the fiction will normally be applied only for the benefit of the child, not for the benefit of third parties.<sup>14</sup>

A related area involves family relief legislation. This type of legislation provides, among other things, that if a person dies without making adequate provision for the proper maintenance and support of his or her dependants, those dependants may apply to the court for an order giving them part of the deceased's estate. In most provinces such legislation defines "dependant" as including a posthumous child of the deceased. The controlling policy in this context is the need to ensure that the deceased's dependants receive adequate maintenance and support.

The fiction that deems a child to have been alive in utero is also evident in cases dealing with statutory compensation of a deceased's dependants. For example, in Fitzsimonds v. Royal Insurance Company of Canada<sup>16</sup> the plaintiff's father was killed in a motor vehicle accident eight months prior to her birth, and an issue arose as to whether she was entitled to benefit as a dependant under his automobile insurance policy. The relevant statutory regulation defined "dependant" as a person under the age of 18 who is "alive" 60 days after the death of the deceased. The Alberta Court of Appeal held that these provisions should be interpreted by applying the fiction that, with respect to property rights, the fetus is deemed to have been alive at the relevant time if it is subsequently born alive. Indeed, the Court of Appeal noted that this fiction is so well established there would have to be express words of exclusion before a statute conferring property rights could be interpreted as displacing it. 18 It is clear from the Court of Appeal's judgment that the dominant policy justification for this view was the perception that it would be unjust to dismiss the child's claim for compensation. Quoting from the decision of

the Supreme Court of Canada in *Montreal Tramways Co. v. Léveillé*, <sup>19</sup> the Court of Appeal observed that "it is but natural justice" that the child's claim should be upheld.<sup>20</sup>

The fiction has also been applied to legislation governing workers' compensation and fatal accidents, so as to deem a fetus to be a "child" or a "dependant" for the purposes of a claim for compensation under those statutes. Likewise, criminal injuries compensation legislation defines "dependant" as including a child of the victim born after the victim's death. 22

In Canadian cases dealing with tort claims for prenatal injuries, two approaches have been adopted. One applies the legal fiction that the fetus is deemed to have been alive at the time of the negligent act if it is subsequently born alive. This approach was adopted by the Supreme Court of Canada in *Montreal Tramways Co. v. Léveillé*<sup>23</sup> in interpreting the provision of the Quebec Civil Code, which imposes liability if a person negligently causes injury to "another." The Court applied the legal fiction so as to conclude that "another" included a fetus. The policy underlying the decision was the need to provide compensation for an injured person. Thus, the Supreme Court stated,

If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.<sup>24</sup>

The alternative approach evident in cases of prenatal injuries does not invoke this fiction; indeed, it expressly recognizes that a fetus has no legal status as a person. Rather, it takes the view that in the law of negligence it is not an essential requirement that the negligent act be contemporaneous with the injury it causes, or for the victim to have been alive at the time of the negligent act, so long as that person is subsequently born alive. This approach was adopted in the Ontario case of *Duval v. Seguin*, <sup>25</sup> as well as in a number of cases in other Commonwealth jurisdictions. As in *Montreal Tramways*, the court in *Duval* emphasized the issue of fairness, concluding that it would be "manifestly unjust and unreasonable" to refuse to recognize a claim for prenatal injuries.

The most recent (and certainly the most interesting) example of a Canadian court recognizing a claim for prenatal injuries is *Cherry (Guardian Ad Litem) v. Borsman.*<sup>28</sup> In that case, the British Columbia Court of Appeal held that a physician performing an abortion owes a duty of care to the fetus as well as to the woman, and that if as a result of the physician's negligence the abortion is unsuccessful and injury is inflicted on the child *in utero*, the physician is liable in damages.<sup>29</sup> The court

awarded damages of approximately \$3 million to the mother and the child in respect of the negligently performed abortion.<sup>30</sup>

In the United States, all jurisdictions recognize the child's right to sue in tort for prenatal injuries,<sup>31</sup> and indeed some courts have extended this to pre-conception torts, that is, where the negligent act occurs prior to the child's conception (for example, before becoming pregnant a woman takes a defective drug, which subsequently causes injury to the child).<sup>32</sup> However, there is no consensus in U.S. law as to whether there can be a wrongful death action on behalf of a child that is stillborn; some courts have denied recovery, but in a majority of states such actions have been successful.<sup>33</sup>

By contrast, it is fairly clear that in Canadian law<sup>34</sup> there can be no claim for damages on behalf of a stillborn child whose "death" was caused by the negligence of another.<sup>35</sup> This is significant because it indicates that legal rights are not conferred on a fetus per se but rather on the person after birth, in respect of injuries inflicted prior to birth. As the Saskatchewan Court of Appeal pointed out in *Borowski v. Attorney-General for Canada*,<sup>36</sup> for the tort cases applying the fiction to have relevance to the legal status of the fetus, they would have had to have conferred rights on a fetus that was not subsequently born alive. Likewise in the area of succession and property, the Saskatchewan Court of Appeal in *Borowski* noted that there is no reported case where a fetus that was not born alive affected anyone's property rights. Justice Gerwing summarized the position as follows:

In summary there are no cases in Anglo-Canadian law giving the foetus *qua foetus* status; the cases in these various branches of the civil law have, in my view, merely dealt with fully capacitated persons before the court, giving some effect to matters which had affected them before they attained that status.<sup>37</sup>

Likewise, in the English case of *Paton v. British Pregnancy Advisory* Service Trustees, <sup>38</sup> Mr. Justice Baker stated,

The foetus cannot, in English law, in my view, have any right of its own at least until it is born and has a separate existence from the mother. That permeates the whole of the civil law of this country ... and is, indeed, the basis of the decisions in those countries where law is founded on the common law ...  $^{39}$ 

# **Human Rights Legislation**

In *Tremblay v. Daigle*<sup>40</sup> the Supreme Court of Canada held that a fetus is not a human being for the purposes of the Quebec Charter of Human Rights and Freedoms<sup>41</sup> and therefore does not enjoy the right to life conferred by section 1 of the Quebec Charter. The case involved an attempt by a man to prevent his former girlfriend from having an abortion. An injunction preventing the abortion had been granted by the Superior Court<sup>42</sup> and upheld by the Quebec Court of Appeal<sup>43</sup> on the basis that a

fetus is a human being within the meaning of the Quebec Charter. Indeed, in the Court of Appeal Mr. Justice Bernier went further than this and held as a general proposition of law that a fetus is a person, stating that a "child conceived but not yet born ... is not an inanimate object, nor anyone's property, but a living human entity." In reversing the Court of Appeal's decision, the Supreme Court of Canada held that, considered as a whole, the Quebec Charter "does not display any clear intention on the part of its framers to consider the status of a foetus." The Court took the view that if the Quebec legislature had intended to bestow a right to life upon fetuses, it would have done so in clear and express terms. 46

The Supreme Court also rejected the argument that the fetus should be regarded as a person under the Quebec Civil Code because of the provisions of the Code conferring patrimonial rights (such as in relation to succession) on the fetus on condition that it is born viable. The Court stressed that such rights are conferred by way of legal fiction, which deems the fetus to have been alive at the relevant time (such as the testator's death or the defendant's negligent act), a fiction that is applied so as to protect the future economic interests of the unborn child. Thus, for example, commenting on its own previous decision in Montreal Tramways Co. v. Léveillé, 47 the Supreme Court emphasized that "while this decision does recognize the possibility of a claim for pre-natal injuries, it does not recognize a foetus as a juridical person."48 The Court concluded that the provisions of the Civil Code dealing with the patrimonial rights of the unborn child "do not manifest an effective or explicit concern for the person and well-being of the unborn child as such and while still unborn" but rather "for all practical purposes only constitute protections of the unborn child's property in anticipation of birth."49

Although dealing with the interpretation of a Quebec statute, the Supreme Court in *Tremblay* noted that its conclusion is consistent with a number of lower court decisions in other Canadian provinces, <sup>50</sup> and in other Commonwealth countries, <sup>51</sup> that a fetus is not a "person" so as to have a right to life that could be protected by means of an injunction preventing its abortion. In one such case the Ontario High Court observed,

A foetus, whatever its stage of development, is recognized as a person in the full sense only after birth ... In short, the law has set birth as the line of demarcation at which personhood is realized, at which full and independent legal rights attach, and until a child *en ventre sa mère* sees the light of day it does not have the rights of those already born.<sup>52</sup>

The Supreme Court in *Tremblay* held that it was unnecessary to decide whether a fetus is a person for the purposes of the *Canadian Charter* of *Rights and Freedoms*, since this was a private dispute between nongovernmental parties and thus the Charter did not apply. Likewise in *R. v. Morgentaler*, <sup>53</sup> in striking down the provisions of the Criminal Code dealing with abortion, the Supreme Court did not discuss the issue of the legal status of the fetus, although Madam Justice Wilson accepted that a fetus

should be recognized as "potential life" from the moment of conception.<sup>54</sup> In her words.

It would be my view, and I think it is consistent with the position taken by the United States Supreme Court in  $Roe\ v$ . Wade, that the value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place in between these two extremes and, in my opinion, this progression has a direct bearing on the value of the foetus as potential life.  $^{55}$ 

In *Borowski v. Attorney-General for Canada*,<sup>56</sup> an action was brought to have the abortion provisions of the Criminal Code declared unconstitutional on the grounds that they deprived the fetus of its right to life, liberty, and security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*. The Saskatchewan Court of Appeal dismissed the action on the grounds that a fetus was not protected by section 7 of the Charter. An appeal to the Supreme Court of Canada was dismissed as moot,<sup>57</sup> for by that stage the Supreme Court had already struck down the abortion provisions of the Criminal Code in its decision in *R. v. Morgentaler*.<sup>58</sup>

Summarizing the recent Supreme Court decisions, Professor McConnell states,

It would seem then that increasingly the debate is focused on determining the status of the foetus. The Supreme Court of Canada clearly does not wish to enter into this debate and is retreating, perhaps rightly so, into narrow legalistic decisions. However, implicitly the cases do seem to reflect a view that the foetus is an entity distinct from other forms of human life and is a form which requires express inclusion in legislation for protection.<sup>59</sup>

## **Child Welfare Legislation**

The legal status of the fetus has also arisen in the context of child welfare legislation, involving the question of whether a fetus can be a "child in need of protection" within the meaning of that legislation. This normally arises in two situations. First, if a pregnant woman refuses consent to proposed medical treatment (for example, blood transfusions or delivery by Caesarian section), thereby placing the fetus at risk, can the child welfare authorities (and ultimately the courts) intervene to protect the fetus by compelling the woman to undergo the treatment? The second situation in which this issue arises involves a woman whose conduct and lifestyle during pregnancy place the fetus at risk (for example, excessive consumption of alcohol creating a risk of fetal alcohol syndrome). Can a fetus be "apprehended" pursuant to child welfare legislation?

In a few Canadian cases a fetus has been held to be a "child" within the meaning of the child welfare legislation. For example, in an Ontario case in 1981, <sup>63</sup> a pregnant woman's neglect of her own health and welfare placed the fetus at risk. The provincial court held that the fetus was a "child in need of protection" and granted an order making the fetus a temporary ward of the Children's Aid Society. Likewise, it has been held in some cases that a pregnant woman's excessive consumption of alcohol, or her heroin addiction, constituted "child" abuse during pregnancy. <sup>64</sup>

More recent cases, however, have rejected this conclusion. For example, in *Re "Baby R,"* a pregnant woman was advised that unless she had a Caesarian section, there was a real risk that the child would die. She refused, and the child welfare authorities "apprehended" the fetus. The woman then consented to delivery by Caesarian section, <sup>65</sup> which was performed. In subsequent child protection proceedings, the British Columbia Provincial Court held that a fetus could be a "child in need of protection" within the meaning of the child welfare legislation. <sup>66</sup> However, this decision was reversed by the British Columbia Supreme Court. <sup>67</sup> In arriving at the conclusion that a fetus could not be a child in need of protection, the court observed,

The ramifications of a prebirth apprehension are self-evident, but need to be said as the effect of authorizing an apprehension prebirth of necessity means controlling the body of the mother to complete and effectuate a custody order.  $^{68}$ 

The reasoning in  $Baby\ R$  was applied in the recent Ontario case of  $Re\ A$ . (in utero), 69 which involved a pregnant woman who suffered from toxaemia and who refused to accept proper prenatal medical treatment. The court held that a fetus could not be a "child" for the purposes of apprehension under the child welfare legislation. The court also held that its inherent parens patriae jurisdiction ought not to be interpreted as extending to the protection of a fetus.

These decisions are consistent with those in other common law jurisdictions, such as England. Some courts in the United States have ordered pregnant women to undergo medical treatment (including blood transfusions and Caesarian sections) to protect the fetus, but a recent decision of the Court of Appeals of the District of Columbia refused to do so and came down very firmly against this type of intervention. The majority judgment concluded that in "virtually all cases the question of what is to be done is to be decided by the patient — the pregnant woman — on behalf of herself and the fetus."

New Brunswick and the Yukon are the only Canadian jurisdictions whose child welfare legislation contains express provisions protecting the fetus. The New Brunswick statute defines "child" as including an "unborn child." The legislation in the Yukon provides that where there are reasonable and probable grounds to believe that a fetus is being subjected to a serious risk of suffering from fetal alcohol syndrome, a court may issue an order requiring the pregnant woman to participate in such reasonable supervision or counselling as the order may specify, in respect of her use

of addictive or intoxicating substances.<sup>75</sup> However, in *Joe v. Y.T. (Director of Family & Children's Services)*, <sup>76</sup> the Yukon Supreme Court held that, in view of its inherent vagueness, this provision infringed the right to liberty guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*. Despite this decision, the statutory provision has not been amended, but apparently child welfare authorities are no longer relying on it.<sup>77</sup>

## **Embryos Ex Utero**

No Canadian court has yet had the opportunity to discuss the legal status of an embryo *ex utero*. However, the issue has arisen in a trilogy of cases in the United States, and these are important in view of the absence of Canadian authority. The three cases are discussed in depth in the section "Reproductive Material as Property" of this report. The cases either expressly adopt, or are consistent with, the legal characterization of the embryo *ex utero* as property. Accordingly, they reject (either expressly or by necessary implication) the view that an embryo *ex utero* is a person. These U.S. cases are therefore consistent with the general theme found in the Canadian cases dealing with the legal status of the fetus.

#### Conclusion

It is apparent from the foregoing that Canadian case law tells us not so much what a fetus is, but rather what it is not. 78 What it is not is a person. Although the question of the legal status of the fetus has arisen in a variety of contexts, there has been a clear consistency on the part of the courts to reject the notion of a fetus as a person. Although in the area of child welfare legislation some courts have been willing to regard a fetus as a person, the more recent cases have repudiated this view. In addition, although it is well established that a fetus may be deemed to be alive for the purposes of acquiring property, the cases emphasize that this is a legal fiction and that these rights are conferred not on the fetus qua fetus but simply to protect the economic interests of the child once it is born. The limited U.S. jurisprudence dealing with the legal status of the embryo ex utero goes much further than simply rejecting a "person" characterization. It expressly acknowledges that property law is an appropriate framework within which to regulate the rights and claims of the various interested parties.

The spectre that reproductive materials may be characterized as property makes it essential that we have a clear and full understanding of property as a legal concept.

# The Legal Concept of Property

# Control — Not Things

In common parlance property refers to things, indeed tangible things, both movable and immovable. Land, houses, furniture, motor vehicles, and personal effects are common examples of this notion of property. This physicalist approach to property is not shared by the modern law. In law, property refers not to material objects but to rights of control and domination over both tangible and intangible things or spheres of activity. Indeed, the essence of property is the exclusive right of control or monopoly over the objects or subject matter of property. *Exclusive* control necessarily implies rights that are enforceable against the world at large. Rights that are enforceable against specific individuals or a limited class of specified persons, such as rights arising from contracts, are personal and not proprietary.

Conceptualizing property in terms of rights over things rather than things themselves has significant implications, particularly in the present context. To inquire whether persons and reproductive materials should have the same status in law as door handles, gizzards of domestic poultry, <sup>82</sup> or motor vehicles invites a very different response than an inquiry about whether persons and reproductive materials should have exclusive control over their corporeal selves and their reproductive products. The intuitive response to the former question is no. The latter question invites a positive response in relation to control over one's self and, perhaps, a mixed and qualified response in relation to reproductive material. Therefore, the manner in which the issue is framed is calculated to affect the resolution of the issue.<sup>83</sup>

With respect to human beings it has been argued that treating bodies as property is abhorrent. Objectifying people undermines human dignity by treating them as mere commodities.<sup>84</sup> Commodification of persons may diminish society's sense of the worth of individuals. 85 This in turn can lead to a reduction of respect and protection that will be accorded to the human body. These observations are founded on the assumption that the body is property. On the other hand, if property is viewed more accurately in terms of control over one's body, these criticisms may be inapt. If property confers exclusive control to people over their own bodies, then their dignity is enhanced, not diminished. Indeed, as a general proposition, the greater the control conferred on individuals in relation to their bodies, the greater the respect that is being accorded to individuals. Giving people control that extends beyond their physical selves accords further respect to individuals. Determining the appropriate boundary or limit of this extended control is, of course, a debatable and very difficult matter. Nevertheless, we feel confident in asserting that most people would support the notion that ordinarily they ought to be able to exercise some measure of control over

reproductive products that have emanated from them but are separate from their bodies. 86

The problem with extending to people proprietary control over their reproductive products, and particularly the products of conception, stems from the uncertainty surrounding the status and nature of these products. If these products are viewed as standard objects of property in respect of which standard property principles should be applicable, then proprietary control poses no difficulty. If, however, embryos are viewed as persons in their infancy, proprietary control is problematic. In this case, to view embryos as property would be as unacceptable as slavery and the treatment of married women and children as chattels belonging to their husbands and fathers.<sup>87</sup> Both these institutions have long since been repudiated by law. To treat people as objects of property in the control of other persons is dehumanizing. Property rights in other persons is antithetical to human dignity, the fundamental value of human autonomy or self-determination, and contemporary principles of equality. Moreover, the notion of property rights in products of conception can be viewed as particularly egregious because it threatens the security interest of persons who are incapable of providing for their own safety and protection. Owners of property may damage or destroy their property. 88 Children, on the other hand, must be safeguarded by their parents, and parental rights exist only to enable parents to discharge their legal obligations to their children. 89

This mode of analysis may lead one to conclude that property law is incapable of affording an appropriate degree of respect and protection to reproductive materials, particularly embryos and fetuses. However, a full appreciation of the legal institution of property suggests that this may not be the case. Indeed, though there may be dangers in subjecting products of conception to property law, the dangers tend to be overstated and, perhaps, less menacing than the dangers of treating products of conception as living persons. The property model may well be able to accommodate competing interests in a more responsive and responsible manner than the law pertaining to persons. This is not to say that either the law of property or the law of persons ought necessarily to regulate the issues raised by new reproductive and related medical technology.

## **Standard Proprietary Incidents**

There are numerous well-defined manifestations of proprietary control. These are often referred to as standard incidents of property. Collectively, these standard incidents form the bundle of rights, powers, immunities, privileges, and obligations that give specific expression to the right of control. The standard incidents are extensive and not mutually exclusive. They include (under both civil and common law principles) the right of possession; the right of exclusion; the power of alienation (including the right to sell, exchange, make gifts, etc.); the liberty to use, enjoy, and manage; the right of destruction and injurious use; and the right to the

fruits and profits ("derivative materials") produced by the object of property. These standard incidents apply to the object of property itself, that is, the *corpus*, and also to the derivative materials generated by the *corpus*. All of these rights may be exercised exclusively by the owner of property. None of the rights is absolute. Indeed, one of the standard incidents of property is a proscription on use that is harmful to others. 92

## **Divisibility of Property**

It is unquestionably possible to have property without all of these standard incidents. Property law is capable of modifying the bundle of standard incidents to accommodate moral and policy concerns. In *First Victoria National Bank v. United States*, the U.S. Court of Appeals observed,

An interest may qualify as "property" for some purposes even though it lacks some of these attributes. For example, an individual can have a "property" right in his job ... yet the job is not assignable, transferable, descendible, or devisable. The "right to publicity" is transferable during life ... but may not be devisable. <sup>93</sup>

Both the common law itself and statute law derogate from the standard bundle of property rights.

As to the common law, while it is not routine for a standard incident of property to be set aside or modified in relation to a particular object of property, there are sufficient instances in which this has occurred to warrant the conclusion that property can and does exist even if all the classic incidents are not present. For example, in a number of different circumstances, private landowners' rights of possession and exclusion have been moderated in deference to superior competing interests. Limiting the right of exclusion in this context means that private landowners cannot oust, or treat as trespassers, individuals who are on their land without their permission or even those whose presence has been objected to by the landowners. 94 The limitation on the landowner's right of exclusion does not apply just in relation to persons of authority who come onto land, but also to private individuals. 95 The competing interests or social goals and values that have led the courts to subordinate the proprietary right of exclusion are diverse and include economic development, public mobility, security of the person, and assisting the underprivileged and powerless. 96 Moreover, common law courts have suggested that property owners' rights of destruction, unlike some of their other proprietary rights (such as their right of alienation), may come to an end at death. 97 Accordingly, a direction in a will to sell property and throw the proceeds into the sea, or a direction to "waste" the decedent's lands, may not have to be complied with. 98 Similarly, the privilege of property owners to use land in an unproductive and useless manner during their lifetimes may terminate at death.99 Thus, property may exist without a complete set of the usual incidents of ownership. Moreover, changes in circumstances can lead to changes in the standard incidents that the law attaches to an object of property.

#### The Existence of Property Absent the Right of Alienation

It is probable that in Canada the right of alienation is not a necessary pre-condition to the existence of property. One of Canada's foremost legal scholars has observed,

The fact that a right is made non-assignable by the law or by parties does not prevent it being property, if it otherwise would be  $\dots$  It is simply the case that one characteristic of property is thereby taken from the right.  $^{101}$ 

Canadian cases that have held that professional licences are property for the purpose of matrimonial property division are consistent with this conclusion. These cases imply that in the absence of the right of alienation, property may still exist. This same point appears to have been in the mind of Rothman J.A. of the California Court of Appeal in the celebrated and controversial case of *Moore v. Regents of the University of California*. After concluding that in law persons may assert property rights in their own tissue, he stressed that he was not expressing an opinion on "whether use of human tissue or body parts ought to be 'gift based' or subject to a 'free market."

#### The Absence of Standard Incidents: When Does Property Disappear?

There appears to be no quantitative or qualitative standard delineating the boundary between property and the absence of property on the basis of the number or types of standard incidents that apply to a particular object. In other words, how much of the pie of standard incidents may be missing before an object ceases to be characterized as property is not clear. In law, this question may not be of great moment. Property is not an allor-nothing concept. It exists in degrees. In its pure form property entails the application of all the standard incidents, but it may also exist in diluted form when a lesser number of incidents are vested in an owner. When property exists in a diluted form an object is property for certain purposes but not for others. This is particularly apparent when one examines the law relating to property rights in corpses.

## **Quasi-Property**

Property to which all the standard incidents do not apply has occasionally been referred to by scholars and the judiciary as "quasi-property." The term has been used to describe the property interest of executors and families in a decedent's body. This particular form of property is extremely weak. It vests its "owners" with possessory rights for the limited purpose of discharging their duties of burying the body or otherwise properly disposing of it. This form of property. For this reason, numerous writers and judges have expressed the opinion that there is no property in a dead body. This view does not conflict substantively with judicial pronouncements to the effect that "quasi-property" rights exist in relation to corpses. Neither camp disputes the existence and scope of the

possessory rights of the executor or the family and neither camp would support the assertion that an executor may sell the decedent's body or parts thereof. The difference is one of approach to taxonomy.

Those who assert there is quasi-property in a dead body take the view that if some of the characteristics of property are present, a form of property exists. To suggest there are no property rights in cadavers and in the same breath acknowledge that executors have possessory rights therein is somewhat bewildering to a property lawyer. Dessession is one of the core concepts of property. It is both a standard incident and evidence of ownership. To say that there are possessory rights but no property rights is therefore a contradiction in terms. On the other hand, implicit in the approach that there is no property in a corpse is the notion that at some point proprietary control becomes so minimal it is inappropriate and perhaps misleading to characterize any residual control as property. Without resolving the issue of which is a preferable approach, we view the use of the term "quasi-property" as attractive because it obviates the impossible (and, for that matter, unnecessary) task of rationally drawing a line between control that is proprietary and control that is insufficient to warrant the label "property."

#### Sui Generis Interests

There is yet another option available to courts in formulating the juridical character of an object. Objects may be characterized as sui generis, that is, unique. The interests of aboriginal peoples in their lands, 113 of purchasers in cooperative apartment complexes, 114 and of families and executors in cadavers<sup>115</sup> have all been held to be *sui generis*. This classification is resorted to when the implications of ascribing an object to an established legal category is considered inappropriate or, at least, not wholly appropriate. In Phillips v. Montreal General Hospital, Justice Davidson was not prepared to treat a cadaver as property "in the ordinary sense of that word," for if he did the cadaver would be subject to a creditor's right of seizure and retention. 116 On the other hand, in his view, at least one of the incidents of standard property necessarily had application to cadavers. The right to obtain and possess an object — the cadaver — was perceived to be practically indispensable to the discharge of the executor's duty to bury. 117 Accordingly, the executor's or family's *sui generis* interest in human remains entails both the presence and the absence of the standard characteristics of property. The same is true of the interest that Indian bands have in their lands. Indians have a legal right to possess and occupy their lands but do not have the right to alienate them. 118

The applicability of some but not all of the standard incidents of property suggests that in the aforementioned cases the concept of *sui generis* interest is substantively the same as quasi-property. This is not inexorably the case. In theory, a *sui generis* interest need not have any particular characteristic, proprietary or otherwise. The utility of the *sui* 

generis label, therefore, is that it permits the law relating to a particular object to be fashioned on a case-by-case basis, without the fetter of proprietary or other preconceptions. When interests are *sui generis*, courts are completely free to develop any legal regime they deem appropriate. As Justice Pannelli of the California Supreme Court stated in his reasons for judgment in the *Moore* case, classifying objects such as human tissue and fetuses as *sui generis* permits courts to regulate these objects with a view to achieving "policy goals rather than abandoning them to the general law of personal property." In practice, however, *sui generis* interests, as they relate to objects, will always have proprietary characteristics. Some degree of control will be conferred on someone. Accordingly, at some point in the jurisprudential development of a *sui generis* interest it will be appropriate to refer to it as "quasi-property." This is readily apparent in relation to the aforementioned examples of Indian lands, cooperative apartments, and cadavers.

## **Curtailing Property Rights**

#### The Impact of Legislation on Property

It is commonplace for legislation to modify the incidents of property. Aside from constitutional constraints, legislators may vary the bundle of rights in any manner they choose. Legislation may enhance or derogate from the bundle of rights applicable to any object.

## **Enhancing Property Through Legislation**

It is relatively rare for legislation to augment property. Undoubtedly this is the case because in its pure form property confers very significant and functionally sufficient control to its owners. However, legislation does occasionally amplify the standard bundle of property rights. Legislation that permits a landowner to abstract from a stream quantities of water larger than would be permitted by common law and legislation that permits the dumping of pollutants into the environment are examples of this form of legislation. Such legislation enhances the property rights of landowners by immunizing them from the standard proprietary proscription against use that is harmful to others.

Legislation may also enhance property rights by establishing incentives to respect such rights in relation to particular objects. Such incentives are normally negative in nature. They take the form of sanctions that are intended to deter infringements of property. There is a myriad of such legislation. The Criminal Code is replete with provisions protecting property. Other legislation is also aimed at protecting property. <sup>121</sup> By having regard to the degree of legislative protection afforded to different types of objects — as measured by the severity of the sanction associated with improper interference with such objects — and to the nature of such protection, <sup>122</sup> it is possible to construct a hierarchy of respect and protection accorded to various objects. For example, objects under the value of \$1 000 are afforded less protection than are objects of greater

value.<sup>123</sup> Special protections are accorded to animals, dwelling units, credit cards, corpses, and numerous other objects.<sup>124</sup> Without delving into the specific details, it is important to observe that there is considerable variety in the nature and extent of the protection given to various objects of property.

#### Legislation That Impairs Property

Legislative derogation from the standard bundle of property rights is so pervasive and so obvious that it is unnecessary to develop and document this point extensively. The right to use and enjoy land is heavily regulated. Zoning laws and building standards detract very substantially from the landowner's control over property. The mode of transfer of land is dictated by legislation. Renovations or alterations of buildings of historical value must be licensed or effectuated in a specified manner. Movables such as motor vehicles must meet certain safety and environmental standards before being imported into Canada. Motor vehicles may not be driven on public roads without an appropriate licence and, in some Canadian jurisdictions, may not be sold in the secondary market without a certificate of fitness. The manufacture, use, and installation of many movables must meet manufacturing, utility, and safety standards. Goods may not be sold if they are unfit for their intended purpose. Animals may not be destroyed, even by their owners, in a manner that causes them unnecessary pain, suffering, or injury. 125

A moment's reflection suggests that legislative impairment of property is intended to promote the public interest in a diversity of ways. The legislation described in the preceding paragraph is aimed at the orderly development of communities, public health and safety, the environment, and the humane treatment of animals. It is also intended to preserve a community's architectural heritage and to protect consumers of goods. Of course, the list of public policies that justify an impairment or abrogation of property is not closed. Such policies vary from time to time and place to place.

Accordingly, legislation may be used to negate socially undesirable effects of property law. Standard proprietary incidents may be wholly or partially abrogated. If the right to sell or even make a gift of an object is disagreeable for any reason whatsoever, legislation may negate the right. It is interesting to note that legislation that impairs or precludes alienation is actually quite common. Reference has already been made to the inalienability of Indian lands. Provincial liquor control legislation substantially impairs the alienability of liquor by private persons. Pharmaceutical legislation precludes any person, even a purchaser-owner of a prescription drug, from selling or otherwise disposing of the drug. A person on the verge of bankruptcy or insolvency may sell property for market value, but may not make a gift of such property. Most pertinent, provincial human tissue gift statutes, though not explicitly addressing the issue of whether human tissue is property, limit alienability of such tissue to gratuitous or gift-based transfers.

## The Subject Matter of Property

How does the law determine what objects may be the subject matter of property rights? The answer to this question may provide a principled basis for determining whether the human body and human tissue are objects of property. The significance of determining that the human body and body parts are capable of being treated as property is that it opens the door to the argument that derivative products of the body, including reproductive materials, are also property.

Few cases address whether human bodies or tissue are objects of property owned by their "host." Canadian cases have not addressed the issue in a considered manner. In Capostinsky v. Olsen, 131 the British Columbia Supreme Court held that people have property in their blood. In the recent case of R. v. Dyment, involving an unlawful seizure of blood in a hospital setting, the Supreme Court of Canada indicated that it was not resolving the case on the basis of property principles but that "it would not be too far-fetched to do so." 132 Neither of these cases provides reasoning or analysis to support the view that blood is or may be property. The cases have done little more than leave open this possibility. The U.S. jurisprudence is further developed, though it, too, is still at a preliminary stage. The Moore case, which is analyzed below, involved an in-depth and reflective analysis of the issue of whether human beings have property in their own bodily tissues. The decision is significant for its qualified rejection of the property theory. Despite finding that policy precluded property theory from being used to protect Mr. Moore on the facts before it, the California Supreme Court made it clear it was not prepared to torpedo completely any role property theory might play in the protection of human beings.

#### General Theory

Until recently it was simply assumed that the human body is not property. People had property in things, were the owners of things, but were not considered to be objects of property themselves. Tort law distinguished and continues to distinguish between trespass to the person (assault and battery) and trespass to property (trespass to land and trespass to chattels). Even experts in property law who have been sensitive to conceptual similarities between persons and property have assumed that persons are not property. In *Brown on Personal Property* the following observation is made:

The concept of rights in rem [that is, rights against the whole world] as rights in a thing does ... satisfactorily represent a large class of the rights in rem as juristically defined. It is not, however, inclusive of all such rights. The right of a person to be free from unauthorized bodily assaults and injuries is likewise one available against persons generally, and so in the sense in which the term is legalistically used is also a right in rem. <sup>133</sup>

Nowhere in this text, or elsewhere, is there a satisfactory explanation of why *in rem* rights in things other than persons are proprietary, but *in* 

rem rights of persons are non-proprietary. How do courts determine which objects are proprietary?

First, it should be noted that not all material things are objects of property. Air and light, for example, have material properties but in most circumstances cannot be owned. Neither air nor light can in any practical sense be exclusively controlled by anyone; moreover, the policy implications of conferring exclusive control over these things would be unthinkable. Both of these points are instructive. They reflect the two methods or approaches used by courts in determining whether or not objects are property. If an object shares the characteristics of property, including its standard incidents, or if it is desirable from the perspective of policy to confer on a person exclusive rights of control over the object, then in law the object may be regarded as property.

Cases concerned with whether university degrees or professional licences are property usefully illustrate both approaches. In the U.S. case of *Graham v. Graham*, the assertion that a degree is property for the purposes of matrimonial property division was rejected for the following reasons:

An educational degree, such as an M.B.A., is simply not encompassed by the broad views of the concept of 'property'. It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term. <sup>136</sup>

Similarly, in the Canadian case of *Linton v. Linton* the Ontario High Court concluded that there is no property in a professional licence because it lacks basic proprietary characteristics such as transferability and exchange value. In addition, the court indicated that policy considerations dictated that such a licence ought not to be treated as property. Valuation of a degree is such a speculative exercise that it could result in substantial inequity in the final division of the parties' matrimonial estates. In the U.S. case of *Woodworth v. Woodworth*, the policy arguments for and against recognizing an advanced degree as property were the central focus of the judgment. The Michigan Court of Appeals rejected the legitimacy of "the standard proprietary characteristics" approach advocated in the *Graham* case, in the following terms:

Yet whether or not an advanced degree can physically or metaphysically be defined as "property" is beside the point. Courts must instead focus on the most equitable solution to dissolving the marriage ... 140

It is clear that policy is the core determinant of which objects are property and which are not. Cases concerned with the issue of whether novel objects, such as degrees, 141 entertainment spectacles, 142 news, 143 or confidential information, 144 are objects of property are replete with policy analysis. Implicit in this form of analysis is the recognition that property is instrumental or purposive in character. Property is recognized to exist and is juristically engineered with a view to promoting policies and interests. The particular policies and interests that justify conferring on individuals exclusive rights of control over an object are diverse, interminable, and often in competition with other important policies or interests. The pro-proprietary policies and interests range from very general to very specific and from pragmatic to quixotic. They include economic efficiency and productivity (including reward for labour), physical and psychological security, privacy, dignity, morality, autonomy, liberty, freedom of and from speech, and freedom of intimate association. 145 No single policy is indispensable to the existence of property. 146

It has been convincingly argued that objects that contribute to the positive development of individuals, that promote healthy self-realization or self-constitution, ought to be recognized not only as property, but also as a superior species of property entitled to the greatest respect and protection afforded to objects of property. Positive development of individuals ("personhood") is facilitated by personal security, privacy, autonomy, and liberty, 148 and the expectation of having these things. Therefore, it is not surprising that the property-for-personhood approach views the human body and the home as the ultimate objects of property. As Professor Radin observes.

If property in one's body is not too close to personhood to be considered property at all,[ $^{149}$ ] then it is the clearest case of property for personhood. The property/privacy nexus of the home is also a relatively clear case in our particular history and culture. $^{150}$ 

## The Human Body as an Object of Property

Both standard characteristics and policy analysis were used by a majority of the California Court of Appeal in the *Moore* case to support the view that people have property in their own bodies. <sup>151</sup> In that case, Mr. Moore asserted a claim to a share of money generated by a patented cell line derived from bodily tissue taken from his diseased spleen. His spleen had been removed as part of his treatment for leukemia. Mr. Moore alleged that his cells and tissue were used to develop the cell line without his knowledge or consent. The various defendants in the case brought an action to strike out Mr. Moore's claim on the theory that even if all the facts he alleged were proved there was no basis in law for recognizing his claim. This defence prevailed at first instance and Mr. Moore's action was struck out. However, on appeal, the California Court of Appeal ruled in favour of Mr. Moore and reinstated his action. The court was unanimous in accepting the theories of breach of fiduciary obligation and breach of duty of full

disclosure. A majority of the Court of Appeal, despite forceful and emotional dissent on this point, also agreed that on the facts alleged, property law could afford relief. On further appeal, the Supreme Court of California unanimously affirmed the non-property theories accepted by the Court of Appeal, but by majority refused to permit Mr. Moore to maintain the lawsuit on the property theory. 152

Speaking for the majority of the California Court of Appeal, Justice Rothman reasoned that people have property in their own bodies because, in relation thereto, they exercise the classic proprietary incident of control. He stated.

Property' refers not to a particular material object but to the right and interest or domination rightfully obtained over such object, with the unrestricted right to its use, enjoyment and disposition ... The rights of dominion over one's body, and the interests one has therein, are recognized in many cases. These rights and interests are so akin to property interests that it would be a subterfuge to call them something else. [emphasis added] $^{153}$ 

Policy analysis was extensively used in the *Moore* case both to support and to assail the notion that people have property in their bodies and body parts. The majority of the Court of Appeal considered the promotion of privacy and dignity — personhood rationales — as irresistible justifications for concluding that people have property in their bodily tissue. Justice Rothman warned,

A patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress. $^{154}$ 

The Supreme Court of California, by a majority, rejected the property theory adopted by the Court of Appeal for three primary reasons.<sup>155</sup>

First, justice could be done, and Mr. Moore's privacy and dignity interests protected, without resort to the "troublesome" law of property. Justice Pannelli, writing for the majority, stated,

One may earnestly wish to protect privacy and dignity without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property. Nor is it necessary to force the round pegs of "privacy" and "dignity" into the square hole of "property" in order to protect the patient, since the fiduciary-duty and informed-consent theories protect these interests directly by requiring full disclosure. <sup>156</sup>

It is not uncommon for courts to prefer non-property theories to solve problems, especially in novel situations. Property rights are expansive. They confer on their owners an extensive array of potent rights. By opting for a non-property approach the difficult policy question of which rights attach to an object of property is avoided. Policy analysis is notoriously indeterminate. For this reason, especially when the policies implicated are

fundamental, courts have often expressed a preference for legislative and other solutions.

That the legislature is better suited than the courts to develop a proprietary regime pertaining to body parts was a second reason offered by Justice Pannelli for opting to resolve Mr. Moore's complaint on the basis of non-proprietary theories.<sup>159</sup> The notion that legislative solutions are preferable to judicial ones is a theme often articulated in cases involving novel questions of property.<sup>160</sup> This is so for reasons of principle and, as well, for practical reasons that relate to the ability of courts and legislatures to resolve complex problems. With regard to principle, the view has often been expressed that it is more appropriate for an institution with a democratic mandate to resolve fundamental questions of policy.<sup>161</sup> Similarly, there is widespread recognition and acceptance that legislatures are far better equipped to resolve complex problems properly.<sup>162</sup>

The third policy reason for rejecting the property theory was very specific. It was accepted by the Supreme Court that juristic recognition of property in human tissue could become a significant impediment to medical and scientific research. Such recognition could hinder research by restricting access to necessary raw materials<sup>163</sup> and could deter even researchers acting in good faith, who might fear the strict liability regime of the tort of conversion.<sup>164</sup>

It was the cumulative effect of these three reasons that led the majority of the Supreme Court of California to conclude that property law is an inappropriate vehicle with which to impose liability on the various defendants. However, it must be stressed that the court did not reject outright the theory that people have property rights in their bodies and body parts. Future use of this theory was expressly left open by the majority judgment of Justice Pannelli when he stated,

While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability. [emphasis added]<sup>165</sup>

It may well be that in a case in which neither fiduciary nor informed consent theories have application, a court will be tempted or "forced" to accept the property theory. For example, had Mr. Moore's tissue been stolen from a laboratory by a stranger and developed into a commercially profitable cell line, or had an organ or other tissue been stolen for personal use, it may be that only property theory could fairly or effectively rectify these wrongs. Accordingly, if it is necessary for the proper protection of human beings to recognize that they have property rights in their own bodies, it is conceivable that such recognition will take place.

Finally, it is important to note that if the courts persistently refuse to recognize that people have property rights in their own bodies, this is not necessarily fatal to the theory that people have property rights in products of conception to which they have contributed or in relation to which they

have some other interest.<sup>167</sup> The existence or absence of property rights of human beings in their own bodies does not necessarily determine whether they have property interests in reproductive material. The latter issue may be legitimately resolved only on the basis of policy.

#### Conclusion

In sum, the concept of property is not a monolithic and intractable concept. There is considerable variation in the degree of control conferred by property on its owners. This variation is a product of both common law and legislation. Concepts such as "sui generis objects" and "quasi-property" are a testimony to the variability of the concept. Though standard proprietary incidents apply to almost all objects, legislative regulation engenders considerable variety in the bundle of rights associated with even these objects. Further species of property are created by statutory codes that comprehensively regulate objects in a policy-specific manner without resort to or the aid of the common law. The variability of property reflects differential policy considerations, which are brought to bear by different objects of property.

# Reproductive Material as Property

# Del Zio v. Presbyterian Hospital

Three cases in the United States have considered the issue of whether reproductive materials are property. The first case, *Del Zio v. Presbyterian Hospital*, <sup>169</sup> decided in 1978, involved a married couple who participated in an *in vitro* fertilization procedure at the defendant hospital. The physician removed an ovum from Mrs. Del Zio, fertilized it *in vitro* using sperm from her husband, and then stored the culture in an incubator. However, the chairman of the department of obstetrics and gynaecology at the hospital, on discovering this, took the view that *in vitro* fertilization was experimental and ought to be discontinued. Accordingly, he destroyed the culture, without the knowledge or consent of the Del Zios. The Del Zios brought an action claiming damages for (1) conversion of their property and (2) intentional infliction of emotional distress. The judge allowed these claims to go to the jury, which found against the Del Zios on the conversion claim but awarded them damages of \$50 000 for intentional infliction of mental suffering.

Some commentators have taken the view that the rejection by the jury of the conversion claim supports the proposition that an embryo *ex utero* does not constitute property. Others have suggested that, because it is a jury decision, the *Del Zio* case is of no value in terms of offering any insight into the legal status of the embryo *ex utero*. For example, one writer notes.

No issues of law dealing with the legal status of such embryos were decided. In all likelihood, the jury was motivated more by sympathy for the infertile Del Zios, and was convinced that the couple had in fact suffered emotional harm. These factors were more likely at the core of the award, rather than any determination by the jury that the doctor had committed an identifiable wrong against the embryo. <sup>171</sup>

However, one must not overlook the fact that the judge in *Del Zio* allowed the conversion claim to go to the jury. The juridical status of an embryo is a question of law to be determined by the judge; it is not a question of fact for the jury. Thus, in allowing the claim to go to the jury, the judge must have been of the opinion that, as a matter of law, an embryo ex utero can be regarded as property for the purposes of a cause of action based on conversion.<sup>172</sup> This is confirmed by the opinion issued by the same judge in later proceedings. The defendant in *Del Zio* applied to have the jury's award set aside on the grounds that it was inconsistent to find in the plaintiffs' favour on one claim (emotional distress) and in the defendant's favour on the other claim (conversion). In dismissing this argument, District Judge Stewart stated,

The jury could reasonably have found liability on the conversion claim, but rendered a verdict for defendants on the basis that the amount of damage for conversion was too speculative to be determinable ... Consequently, the jury may have concluded, and properly so, that any damages for conversion were already included in the damages awarded for the intentional tort. <sup>173</sup>

The judge's explanation of the reasons for the jury's verdict is, of course, pure speculation. However, his statement that the jury "could reasonably have found liability on the conversion claim" confirms that the judge was of the opinion that, as a matter of law, the embryo *ex utero* could be characterized as property and thus form the subject matter of a claim based on conversion. It appears, however, that the judge arrived at this conclusion without any reasoned analysis (or even discussion) of the relevant legal principles and case law, and for that reason the *Del Zio* decision is of minimal persuasive authority in Canada.<sup>174</sup>

#### York v. Jones

In *York v. Jones*, <sup>175</sup> Mr. and Mrs. York enrolled in a program of *in vitro* fertilization at the Jones Institute in Virginia. They signed a form that outlined both the nature of the cryopreservation procedure that would be used by the Institute to preserve their "pre-zygotes" (the term used in the parties' agreement) and also their rights in relation to the frozen pre-zygotes. <sup>176</sup> During the course of the treatment the Yorks moved to California. They sought to transfer a single remaining frozen pre-zygote at the Jones Institute to a similar institute in Los Angeles. Both their personal request for such a transfer and a request made on their behalf by a physician associated with the Los Angeles facility were denied. The Yorks

filed suit against the Jones Institute with a view to compelling the transfer. They asserted, among other things, that the Institute was in breach of contract and, as well, that it had committed the tort of detinue. This tort protects property interests and is proved if a person with a right to immediate possession of a chattel requests the return of the chattel and is improperly denied. The various defendants moved to strike out the Yorks' statement of claim on the theory that even if all the facts alleged by the Yorks were proved, the law did not sustain the theory of their case. The motion was denied, leaving intact both allegations — breach of contract and detinue. The motion was denied, leaving intact both allegations — breach of contract and detinue.

With respect to contract, the court held that the parties had entered into a contract of bailment. A bailment relationship is a proprietary relationship in which a bailee has possession of a chattel belonging to a bailor. When a bailment exists, bailees have an absolute obligation to return the subject matter of the bailment to the bailor. Some writers have suggested that the court simply assumed without question that a frozen embryo is the property of gamete donors. However, this does not appear to be the case. Rather, the court held that the bailment relationship between the Yorks and the Jones Institute arose from their written agreement, not because the agreement indicated an intent that the parties enter into such a relationship, but because in the circumstances of the case it evidenced that all the requisite elements of a bailment relationship were present. The requirement that the Jones Institute be in possession of the Yorks' property was clearly satisfied according to the court by the intention apparent in the agreement to treat the pre-zygotes as property.

The conclusion that the pre-zygote was property because the parties intended to treat it as such is strange indeed. Whether an object is property is a question of law and not a question to be determined by the intention of parties to a private agreement as gauged by their agreement. It makes little sense to permit parties to create rights operative against the whole world in a contract intended to set out the rules of their personal relationship. The legal question is determined by policy. A discussion of policy was conspicuous by its absence in the *York* case. In any event, the court held that a bailment existed and that the specific terms of the contract did not, in the circumstances of the case, waive the standard obligation of a bailee to return the subject matter of the bailment. Having concluded that the pre-zygote at issue belonged to the Yorks, the court also approved of the detinue theory of the case.

It will be appreciated that the *York* case, like *Del Zio*, is not a particularly strong authority for those who would assert that the law recognizes property in reproductive material. In *Del Zio* the characterization of the frozen embryo as property was implicit. In *York* the issue was expressly addressed, but the conclusion reached was based on minimal and probably suspect legal reasoning.

#### Davis v. Davis

The most recent, interesting, and informative of the U.S. cases confronting the issue of whether products of conception are property is Davis v. Davis. Mr. and Mrs. Davis were participants in the program of in vitro fertilization at a Tennessee fertility centre. After several unsuccessful implantations, seven embryos were placed in cryogenic storage for future use. Subsequently, the Davises' marriage disintegrated. In their divorce proceedings the couple fought for "custody" of the embryos. Mrs. Davis sought to have the embryos implanted. At trial she successfully asserted that the embryos were living persons and their custody should be determined on the basis of the traditional test of "best interests of the child." 183 Mr. Davis argued that the embryos were property with the potential of becoming human beings. On this basis he sought an order that the parties be given joint control over the embryos. Justice Young of the Tennessee Circuit Court expressly rejected the notion that the embryos were property and concluded that the embryos were human beings as of the moment of conception. Accordingly, custody of the embryos was determined by family law principles and not property law. Because the embryos were human beings in need of protection, the doctrine of parens patriae and its attendant "best interests of the child" test were applied. 184 Justice Young took the view that it was in the "manifest best interest of the children, in vitro, that they be made available for implantation to assure their opportunity for live birth." For this reason, Mrs. Davis was awarded custody.

On what basis did Justice Young conclude that embryos are human beings and not property? With respect to property, he relied on a conclusory statement made by Senator Gore to a subcommittee of Congress to the effect that human beings and property differ sharply. 186 In addition, and far more salient, he seemed to proceed under the assumption that if embryos were classified as living persons they could not be categorized as property belonging to another. In the end, Justice Young accepted as scientific "fact" that embryos are living persons. He gave legal expression to this "fact" by conferring on the embryos the legal status of living persons. The resolution of two scientific issues seems pivotal to Justice Young's analysis. First, he found as a fact that upon conception a unique individual distinct from all others comes into existence. He accepted the minority opinion of the various experts who testified before him that the cells of in vitro embryos are differentiated from one another and from the cells of other embryos. 187 Secondly, he rejected the argument that an in vitro embryo cannot be said to be a living person because it does not have the usual characteristics of living persons such as a nervous system and other body parts. He concluded that embryos are completely constituted persons:

Upon fertilization, the entire constitution of the ... [person] is clearly, unequivocally spelled-out, including arms, legs, nervous systems and the like; that upon inspection via DNA manipulation, one can see the life

codes for each of these otherwise unobservable elements of the unique individual.  $^{188}$ 

This approach — classifying for legal purposes according to scientific attributes — is extremely problematic. It shrouds a subjective value choice about when, and to what degree, a product of conception should be accorded the rights and protections of human beings. Assuming, *arguendo*, that Justice Young's findings on the scientific issues were correct, it is far from apparent why a scientific approach, and in particular the scientific criteria adopted by Justice Young, <sup>189</sup> should be the exclusive touchstone of the juridical status of an embryo as a human being. As the Supreme Court of Canada stated in *Tremblay v. Daigle*, <sup>190</sup> in determining whether a fetus is a person for the purposes of the Quebec Charter of Human Rights and Freedoms

Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. <sup>191</sup>

Even if an embryo is fully constituted in a genetic sense, it is not clear why this fact warrants treating the embryo as a child. At least arguably there is more to being a living person than being organic material programmed over time to mature into a human being. In *Davis*, Justice Young did not advert to philosophical and psychological criteria of being a living person. Nor was there any discussion of why these and other perspectives do not inform the judgment of the court on the question of what is, in law, a human being. 192

More to the point, a general inquiry into when human beings come into existence is too unfocussed. A preferable approach, supported by contemporary legal analysis, is purposive classification. 193 This entails asking whether embryos should be treated as human beings, not as an abstract and general question, but for the specific purpose of determining which set of principles best resolves a custody dispute between progenitors of the embryos. Asking the question purposively facilitates the identification of competing interests, which should be the focus of consideration in the resolution of any legal dispute. 194 The proper accommodation of competing interests in a difficult case is not advanced by the simple and unfocussed expediency of classification. Until the purpose and ramifications of classification are known it is impossible to classify in a rational manner. The proper accommodation of competing interests is facilitated by the identification and judicious weighing of these interests. The reasoning process requires that competing interests be identified and weighed first and that classification subsequently occur in accordance with the first stage of the reasoning process. The only acceptable exception to this approach is to characterize an object as sui generis. This classification, of course, does not impair the important first stage of the reasoning process.

In its review of the trial decision in *Davis*, the Tennessee Court of Appeal seems to have gone through at least a semblance of the process of identifying and weighing competing interests. <sup>195</sup> It should be noted that by the time the case was heard by the Court of Appeal, both Mr. and Mrs. Davis had remarried, and neither wished to have a child parented by the other. However, Mrs. Davis wished to make the pre-embryos available to others. <sup>196</sup> Justice Franks, rendering the unanimous judgment of the court, overturned the trial judgment and awarded the parties "joint control of the fertilized ova ... with equal voice over their disposition." <sup>197</sup> The trial judgment was reversed because

Awarding the fertilized ova to ... [Mrs. Davis] for implantation against ... [Mr. Davis's] will constitutes impermissible state action in violation of ... [Mr. Davis's] constitutionally protected right not to beget a child where no pregnancy has taken place. 198

The recognition that Mrs. Davis also had a fundamental right to prevent procreation involving her reproductive material (her competing interest) was the basis for awarding the parties a joint interest. As to the embryos themselves, the court noted that under the law and public policy of Tennessee they were not entitled to the same protection as "persons." Justice Franks elaborated by stating that as embryos mature "they are accorded more respect than mere human cells because of their burgeoning potential for life." He then added that "even after viability, they are not given legal status equivalent to that of a person already born." In the result, the court directed that a judgment be entered "vesting" the former couple with "joint control of the fertilized ova and with equal voice over their disposition."

Though the language used by Justice Franks necessarily implies a rejection of the trial court's view that embryos are living persons, at no point does he affirmatively and expressly describe the embryos as property. Nevertheless, the terminology used to describe the interests in the embryos is suspiciously property-like. Moreover, to the extent that control over objects, other than persons, is an indication of property, this case can be viewed as recognizing in a *de facto* sense that people may have property rights in pre-implantation embryos. The most important contribution of the case, however, is not its implications for taxonomy. Instead, it is the articulation of the policy underlying the court's order that the parties together control the destiny of their embryos.

The public policy in favour of choice in procreation decisions may be a potent basis for the recognition of property or property-like rights in reproductive material. In *Davis* the Court of Appeal acknowledged that this policy had constitutional vitality. Both parties were held to have a constitutional right not to beget children before pregnancy. In Canada, on facts similar to *Davis*, it is unlikely that the policy in favour of procreative choice could be asserted as a constitutional right. Though the *Canadian Charter of Rights and Freedoms* may well support a constitutional

right not to procreate,204 it is doubtful whether such a right could be advanced in a purely private dispute between divorcing spouses. 205 Nevertheless, there is at least a reasonable prospect that Canadian courts will recognize that procreative choice is a fundamental value informing private law, 206 a value that is capable of fashioning a proprietary right in embryos in much the same manner as it did in the Davis case.

In conclusion, the cases of Del Zio, York, and Davis support the view that reproductive material is property. In addition, the California Supreme Court in *Moore* appears to have taken the view that fetuses ought to be regarded as "objects sui generis." None of the cases adopts the standard incidents approach, and (with the exception of the Court of Appeal's judgment in Davis) none engages in a policy analysis. 208 Indeed, as noted above, legal reasoning is entirely absent or erroneous in some of the cases. Nevertheless, the cumulative effect of these decisions is significant in that they demonstrate a willingness to characterize reproductive material as property. Though the cases involve diverse factual contexts, the central issues are the same, namely, who should have control over reproductive material and what should be the nature and extent of this control. These cases view property law as an appropriate regime within which to determine these issues. As the Court of Appeal judgment in Davis indicates, there may well be strong policy justification for doing so.

# The Implications of Applying a Property Analysis

## **Unfettered Property Rights in Reproductive Materials**

We have seen that existing case law gives some legitimacy to applying a property law analysis to reproductive material. This section examines the implications of such an analysis. First, we consider the consequences of applying a "pure property" analysis, that is, an unrestricted, unfettered property law regime. This should not be taken to imply that a property law regulation of reproductive material must necessarily be unrestricted or, indeed, that this form of regulation is desirable. On the contrary, we conclude later in this section that an unfettered property law regime should (and almost certainly would) be viewed as inappropriate. Nonetheless, it is important at this juncture to highlight some of the consequences of an unrestricted property law analysis.

The implications described in the following text are illustrative, 209 not exhaustive. We have chosen examples that focus on the main legal issues likely to arise with respect to control over reproductive material. exploring the effects of an unfettered property law analysis, it is assumed (for this purpose) that the human body is treated in the same manner as objects to which the pure property concept is applicable. This assumption is made for illustrative purposes only and does not reflect our judgment

about the likely outcome of a property analysis in relation to the human body.

Assuming that standard incident analysis were applicable to human beings, it would have the following results. The rights of possession and exclusion would promote security, autonomy, and privacy interests of individuals. These rights would protect at least the physical integrity of human beings. The right of use and enjoyment would protect autonomy and liberty interests. It would promote both freedom of movement and activity of individuals. Specifically with respect to reproductive material, the right to derivative matter would support a claim to products generated by a person's body, including (presumably) gametes. Thus, donated sperm or ova would be owned by the donor. On the death of the donor the gametes would be dealt with according to the terms of the donor's will or, if there were no will, according to the law of intestate succession. Thus, taking the facts of a French case as an example, <sup>210</sup> if a man were to die leaving frozen sperm in a sperm bank, the beneficiary of his estate (for example, his widow)<sup>211</sup> would be entitled to the sperm. <sup>212</sup>

The ownership of zygotes produced by the union of gametes would be determined on the basis of the property doctrine of accession. Though not entirely clear, the law of accession would probably support the conclusion that zygotes are owned in common (probably jointly) by the contributors of the gametes. Accordingly, an embryo *ex utero* could not be implanted, destroyed, or otherwise dealt with in the absence of consent from both gamete donors. Both could agree to have the embryo cryopreserved without any restriction on the duration of storage; both could agree to have the embryo implanted in another woman. If the gamete donors were married and subsequently went through divorce proceedings, the frozen embryo would probably be viewed as matrimonial property and its ownership determined according to matrimonial property legislation. On the basis of the law of accession, an embryo, once implanted, would probably be viewed as belonging to the woman in whom it is implanted.

The standard application of the right of destruction would permit individuals to destroy themselves, as well as any reproductive materials they own. Thus, gamete donors would have the legal right to require that their stored gametes be destroyed. As noted earlier, an embryo *ex utero* could not be destroyed without the consent of both gamete donors. The right of alienation, in theory, would permit individuals to sell or donate their physical person and any reproductive materials they own. The right of alienation would also permit individuals to use their bodies as security for loans or the performance of other obligations. Since property law considers the objects of property to be divisible and attaches the standard incidents of ownership to parts of the *corpus* of property, human body parts and parts of human reproductive materials could also be sold or gifted or used to secure benefits.

With respect to non-therapeutic research and experimentation on embryos ex utero, a pure property analysis would impose only one

restriction, namely, that the consent of both gamete donors be obtained. In addition, under an unfettered property regime, donors could sell their embryos for research, and indeed they could create embryos solely for this purpose, with no intention of using them for implantation.

If research on embryos were to generate financial profit, the donors would probably have a legal right to these profits or at least a share thereof. If the research were done without the consent of the gamete donors (a situation analogous to that in the *Moore* case), a property law analysis would entitle them to sue for damages for conversion, which would probably include the profits generated by the research.<sup>217</sup> If the research were done with consent, the parties' rights would probably depend on the terms of any agreement, and, in the absence of an express agreement, the law might imply a contractual right to a reasonable share of the profits generated by the research.

## The Desirability of a Property Analysis

#### Concerns About a Pure Property Regime

The description in the previous paragraphs is intended to present graphically the implications of a relentless application of pure property principles to the bodies of human beings and their reproductive material. Some of these implications are undoubtedly desirable. Liberty, privacy, autonomy, and dignity are promoted by property rights. Other implications would be viewed by many as problematic, if not downright chilling. A marketplace for human body parts and reproductive materials, and rights of destruction and experimentation, raise profound questions of morality and social policy.<sup>218</sup>

That some of these implications have been viewed as entirely unacceptable can be seen from legislation pertaining to new reproductive technologies in other countries, and also from law reform reports in Canada. For example, with respect to research and experimentation on embryos, the Law Reform Commission of Canada has recommended a number of controls and regulations, 219 including a prohibition on experimentation after the fourteenth day of embryonic development.<sup>220</sup> A similar prohibition was recommended by the Ontario Law Reform Commission<sup>221</sup> and is also contained in legislation in the United Kingdom. 222 The guidelines issued by the Medical Research Council of Canada (MRC) (which must be complied with by any researcher seeking funding from the MRC) state that research on embryos "should be limited to research directed toward improvement of infertility management, using embryos up to a stage of development of no more than 14 to 17 days."223 In addition, the Law Reform Commission of Canada recommended that the creation of embryos solely for the purpose of scientific research be a criminal offence, 224 and that certain types of experimentation (such as ectogenesis and parthenogenesis) be prohibited. 225

Restrictions have also been imposed or recommended with respect to the storage of gametes and embryos. For example, the U.K. legislation provides a maximum storage of 10 years for gametes and 5 years for embryos. A 10-year limit on storing frozen embryos was also recommended by the Ontario Law Reform Commission, whereas the Law Reform Commission of Canada recommended a 5-year limit.

The commercial implications of unfettered property rights in body parts and reproductive material are also likely to be viewed as unacceptable. Canadian human tissue gift legislation prohibits the sale of human tissue and body parts (except blood or blood constituents). A similar position has been adopted in foreign legislation dealing with reproductive material: in the Australian state of Victoria, for example, legislation prohibits payment (other than expenses) to gamete donors, as does the U.K. legislation unless there is express authorization by statutory directions. In both the United Kingdom and Victoria, and Victoria,

It is clear from the foregoing discussion that some of the implications of a pure property analysis have been viewed as inappropriate by a number of legislatures and law reform agencies. However, only *some* of the property law implications have been rejected. In other instances, the position adopted by legislatures and law reform agencies has been entirely in line with a property law analysis. For example, we have seen that a property law regime would vest exclusive control of gametes, and joint control of embryos *ex utero*, in the gamete donors. This is precisely the position adopted by the U.K. legislation. Moreover, it is important to bear in mind that the implications of an unfettered "personhood" analysis, when applied to embryos (including those *ex utero*), are at least equally unacceptable, and probably more so, than the implications of an unfettered property regime. This point lies at the heart of the judicial resistance to the notion that concepti are human beings. As Professor Dickens comments,

If pre-embryos were to be given the legal status of persons or human beings ... a radical revolution in our public, constitutional and private law would be achieved with repercussions extending far beyond the areas of abortion and management of reproductive choice. From private inheritance and succession law [<sup>237</sup>] to public revenue law affecting allowances for dependent children, from provincial law on the protection of children by parents and by officers of child welfare agencies to federal law on Criminal Code liability for manslaughter and police investigational duties where manslaughter is suspected, provisions and effects of laws would have to be fundamentally reassessed. Women's privacy would be devastated by tests mandated to determine if they were abusing unborn children ...<sup>238</sup>

#### Capacity of Property Law to Respond to These Concerns

Is property law capable of modifying the bundle of standard incidents to accommodate moral and policy concerns? Can there be property in the human body and derivative reproductive materials without, for example, a right to sell parts, or without the other implications that are likely to be viewed as unacceptable?

The answer to these questions is a clear yes. We have already discussed in some detail the capacity of the common law of property to modify the standard property incidents to respond to policy considerations. We have also noted how legislation often imposes restraints on property rights to accommodate policy concerns and competing superior interests. Thus, it would be incorrect to assume that if the law of property were to regulate issues relating to reproductive material, this would necessarily have to be an unfettered property regime. Such a regime exists in very few instances, and it would be unrealistic to suppose that it would exist in relation to reproductive material.

Consider, as a specific example, the fundamental issue involved in the *Davis* case<sup>241</sup> — who ought to have control of a frozen embryo? If we decide that, as a matter of policy, the gamete donors ought to have joint control, we may also view property law as an appropriate mechanism by which to achieve that policy goal. Property law has the capacity to recognize that the gamete donors have joint "ownership" of the frozen embryo.<sup>242</sup> However, it does not necessarily follow that the owners should be able to sell their property (indeed, existing law precludes this),<sup>243</sup> or pass it on to their heirs, or consent to its being used for scientific research. These issues give rise to different policy considerations and may require different legal responses.

Property law is *capable* of responding responsibly to the policy concerns implicated by standard property analysis. Moreover, property law has the *capacity* to be responsive to changing circumstances such as the implantation and maturation of reproductive materials. Although progenitors of an embryo may have joint rights in the embryo in its *in vitro* stage, these rights do not imply that after implantation the progenitors continue to enjoy joint rights. The doctrines of accession and fixtures in property law are analogues that demonstrate property law's *capacity* to view ownership as having changed upon the affixation of an object of property. That an owner's right of destruction over reproductive material may be diminished as the conceptus matures is also a notion that property law is *capable* of embracing.<sup>244</sup>

Embryos may be viewed either as quasi-property objects or as *sui generis* objects. Particularly in the case of *sui generis* objects, law may be developed without the fetter of preconceived rules or policies. <sup>245</sup> Competing interests can be identified and weighed in relation to each of the specific issues that will or may emerge in relation to reproductive material. The common law, legislation, or a combination of the two are *capable* of fashioning a special proprietary regime suitable to the unique subject matter of reproductive material.

## Problems with a Common Law Response

In the previous paragraphs we stressed that the common law of property has the capacity to respond to policy concerns by tailoring a special proprietary or *sui generis* regime to regulate reproductive material. However, in an area as unique as this, one cannot predict whether that capacity — that potential — will be realized. As we have already discussed, U.S. courts have shown some willingness to use the law of property to resolve legal issues within this area. It is impossible to predict whether this trend will continue and whether it will be followed in Canada.

This difficulty highlights one of the problems inherent in a common law, <sup>246</sup> case-by-case approach — its unpredictability and uncertainty. If we leave it to judges rather than legislatures to determine whether (and to what extent) property law should be used to regulate reproductive material, the law will develop essentially on an ad hoc basis, with the eventual outcome uncertain. Moreover, there is a danger of lack of uniformity, with judges in different provinces (and, indeed, different judges in the same province) adopting disparate legal analyses of the same issues. In an area such as this, the need for uniformity and certainty in the law seems particularly compelling. <sup>247</sup>

Probably the strongest objection to a common law response is that the legislature is usually a far more appropriate forum for deciding issues of public policy. As the Supreme Court of Canada noted in *Tremblay v. Daigle*, "Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature." The issues generated by new reproductive technologies are significant and contentious and require proper research, consultation, and debate. The legislative process is unquestionably more suited to this task than is the judicial process.  $^{\rm 249}$ 

# **Conclusion: Avoiding the Problem of Taxonomy**

We have seen that a property law model, particularly one modified by legislation, has the capacity to respond to policy concerns and to accommodate competing interests. Thus, it could be viewed as an appropriate regulatory device for determining legal issues generated by the new reproductive technologies. However, several law reform agencies have rejected this conclusion, summarily dismissing the property model as entirely inappropriate. For example, the Law Reform Commission of Canada stated that "the law should never treat embryos and foetuses as mere objects." Likewise, the Warnock Committee in the United Kingdom rejected as "undesirable" the concept of property in human embryos and recommended that "legislation be enacted to ensure there is no right of ownership in a human embryo."

However, if we examine this type of recommendation more closely, it becomes apparent that it is really property law's label, rather than its principles, that is being rejected. This is particularly true of the Warnock Report. Although the Report purports to reject a property law model, a number of writers have noted that many of its recommendations in fact embrace property law principles.<sup>252</sup> For example, Professor Kennedy expresses the opinion that a close examination of the Warnock Report's specific recommendations reveals a "hoax," 253 or an analysis that is either jurisprudential "nonsense" or, at the very least, jurisprudentially flawed. 254 This is because the substance of the Report's recommendations pertaining to use, alienation, and destruction of embryonic materials creates property by conferring on various persons, including "the couple," incidents of control.<sup>255</sup> Both Kennedy, in his acrid denunciation of the Warnock Committee's handling of the issue of property in embryos, and Justice Rothman of the Supreme Court of California in the Moore case<sup>256</sup> concur that if rights of control exist in relation to an object, a property regime may well exist.

Although new reproductive technology gives rise to a wide range of legal questions, the central issue is essentially the same, namely, the allocation of control and "decisional authority." As Professor John Robertson states.

The question of decisional authority is really the question of who owns or has a property interest in early embryos. Applying terms such as "ownership" or "property" to early embryos risks misunderstanding. Such terms do not signify that embryos may be treated in all respects like other property. Rather, the terms merely designate who has authority to decide whether legally available options with early embryos will occur, such as creation, storage, discard, donation, use in research, and placement in a uterus. Although the bundle of property rights attached to one's ownership of an embryo may be more circumscribed than for other things, it is an ownership or property interest nonetheless. 258

We agree entirely with this view and wish to stress that terms such as "property" and "ownership" are likely to be misunderstood in the present context. As the earlier part of this paper explains, the legal concept of property focusses on *control* over things rather than things themselves. Thus, a recommendation that embryos *ex utero* ought to be treated as the property of the gamete donors merely implies that property law is an appropriate legal mechanism for determining issues of control and decision-making authority. However, there is a real danger that this will not be understood, and that the recommendation will be taken to mean that human embryos should be treated as objects, "of no more moral worth than a hamster or a piece of mouse tissue."

Thus, for symbolic (as well as political) reasons, it may be advisable to refrain from applying the term "property" to reproductive materials. Moreover, using the term "property" to describe reproductive materials to a certain extent may create inappropriate preconceptions about the juridical

nature of these unique materials. Accordingly, it is our recommendation that any legislative scheme should characterize reproductive material as *sui generis*. This recommendation ought not to be treated as a *rejection* of the law of property in its entirety. Any statutory scheme regulating new reproductive technology will necessarily reflect policy choices, some of which will undoubtedly embrace property concepts. The law of bailment, and its application to stored embryos, is an example in point. <sup>260</sup> An express statement, either in the Commission's report or in any subsequent legislation, that reproductive material is not property could be misleading and could prevent courts from using appropriate property concepts in applying and interpreting the legislation. A legislative scheme that characterizes reproductive material as *sui generis*, but that does not reject property principles, affords courts this latitude without evoking an unwarranted and unnecessary emotional debate.

By virtue of its neutrality, a *sui generis* approach is indeterminate in its implications and necessarily involves uncertainty. However, this drawback can be minimized by comprehensive legislation containing specific and substantive rules. Accordingly, it is essential that the legislation address as comprehensively as possible the many issues arising from reproductive material and related technologies. It is only where the legislation is silent or unclear that the *sui generis* approach may produce uncertainty, but in our view this is preferable to a more rigid approach based on the characterization of reproductive material as either property or person.

It is beyond the scope of this paper to make recommendations with respect to the policies that should be promoted by a body of law pertaining to reproductive material and technologies. The thrust of our recommendations, that reproductive material be characterized as *sui generis*, is policy neutral. Without knowing what policy choices are likely to be made by the Commission, we cannot discuss the legal and policy implications of characterizing reproductive materials as *sui generis*. Indeed, it would be folly to do so. What we can say and have said is that our suggested model provides sufficient legal flexibility to accommodate a wide range of policy choices; however, it does not offer a basis for making these policy choices. Indeed, that is the very reason for our recommending a *sui generis* characterization. It is essential, especially in this context, that legal frameworks not dictate (or even influence) policy choices.

## **Addendum**

A number of important legal developments have occurred since the original paper was submitted to the Commission in January 1992. The case of *Davis v. Davis* (discussed above) was appealed to the Tennessee Supreme Court in 1992. The Supreme Court affirmed the Court of Appeals' conclusion that pre-embryos are not "persons" in law. However,

the Court also held that the Court of Appeals was wrong in implying that the Davis' interest in the pre-embryos was in the nature of a property interest. The Supreme Court concluded that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." Although noting that the Davis' did not have a "true property interest," the Court observed that "they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos." In the end, the Court held that Ms. Davis' interest in being able to donate the pre-embryos to another couple was over-ridden by Mr. Davis' interest in choosing not to have children; thus the Court found in favour of Mr. Davis.

In another recent case, Hect v. Superior Court (Kane), 264 the California Court of Appeal held that cryogenically preserved sperm was a "unique" category of "property" which formed part of the decedent-donor's estate. and therefore was subject to the decedent's directives in his will. Relying on the decision of the Supreme Court of Tennessee in Davis, the Court noted that the "value of sperm lies in its potential to create a child after fertilization ..." and that the decedent's decision-making authority regarding his sperm gave him an "interest" "in the nature of ownership." Lillie J. stated that, even if the sperm was not governed by the general law of personal property, it occupied an "interim category" of "property" that was subject to the jurisdiction of the Probate Court. 266 Lillie J. also observed that the Moore case did not definitively resolve the "debate over the existence or extent of a property interest in one's body."267 In addition, it was held that there was no public policy impediment to giving effect to the will's direction that the sperm be given to the decedent's surviving companion, an unmarried woman. This was so notwithstanding the objection of the decedent's surviving adult children.

The recent New Brunswick Queen's Bench decision of *Re Wishart*<sup>268</sup> is also of some importance. In that case the Court suggested that a direction in a will to destroy the testator's horses would be contrary to public policy. The decision is further evidence of the common law's ability to restrict the property interests of an individual in order to further social policy.

## **Notes**

We would like to thank our research assistant Ms Renée Craig.

- 1. See infra, notes 87-89 and accompanying text.
- 2. See generally G.L. Gall, *The Canadian Legal System*, 3d ed. (Toronto: Carswell, 1990), 274-75. The degree of persuasiveness of non-domestic case law depends on a variety of factors, the most important of which, we would suggest, are the cogency and rigour of the reasoning and its relevance in the Canadian context. Other

factors include jurisdiction, level of court, reputation of the judge, and currency of the case. Referring to the law of non-Canadian jurisdictions is particularly appropriate in an area of emerging law where other jurisdictions are more advanced, albeit only slightly, in their consideration of the problems associated with the area.

- 3. See infra, notes 87-89 and accompanying text.
- 4. R.S.C. 1985, c. C-46, s. 223(1).
- 5. However, if a child is injured before or during its birth, as a result of which the child dies after it is born, the person causing the injury may be guilty of homicide: see Criminal Code, s. 223(2); *R. v. Prince* (1988), 44 C.C.C. (3d) 510 (Man. C.A.).
- 6. The Canadian Medical Association, *New Human Reproductive Technologies: Preliminary Perspectives*, brief to the Royal Commission on New Reproductive Technologies (Ottawa: CMA, 1991), 164, takes the view that if a fetus were removed temporarily from the uterus for the purpose of performing fetal surgery, with a view to returning it later to the uterus, the fetus would be a "human being," as defined in the Criminal Code, during the surgery. This interpretation is questionable. It is by no means clear that a court would regard the fetus as "in a living state" during its brief excursion outside the womb. It may also be doubted whether Parliament intended the phrase "completely proceeded ... from the body of its mother" to include temporary removal from the mother's body.
- 7. (1991), 63 C.C.C. (3d) 97 (S.C.C.). For a discussion of the decision see K.M. McCourt, "Foetus Status After R. v. Sullivan and Lemay," *Alberta Law Review* 29 (1991): 916-25.
- 8. For a similar English decision see R. v. Tatt, [1989] 3 W.L.R. 891 (C.A.).
- 9. R. v. Sullivan (1988), 43 C.C.C. (3d) 65 (B.C.C.A.).
- 10. The British Columbia Court of Appeal substituted a conviction of criminal negligence causing bodily harm to the mother, but this was reversed by a majority of the Supreme Court on procedural grounds.
- 11. Although this example is written in the masculine gender (because in practice the issue arises almost invariably in the context of a child born after its father's death), other examples are possible. In recent years there have been a number of media reports of pregnant women being kept on mechanical respirators past the point of brain death, until after the birth of the child. It is probably correct to state that such a child is born after the death of its mother. See also *infra*, note 237.
- 12. See C.H. Sherrin, R.F.D. Barlow, and R.A. Wallington, eds., *Williams' Law Relating to Wills*, 6th ed. (London: Butterworths, 1987), 592-93. In Quebec the Civil Code, S.Q. 1991, c. 64, article 838, provides that a person may benefit under a will, even if not born at the time of the testator's death, so long as the beneficiary was conceived at that time and is subsequently born viable. See also the Wills Act, R.S.M. 1988, c. W150, s. 25.3 [en. 1989-90, c. 44, s. 5].
- 13. Intestate Succession Act, R.S.A. 1980, c. I-9, s. 10.
- 14. Elliot v. Joicey, [1935] A.C. 209 (H.L.). One exception to this is found in the law of property, in relation to the rule against perpetuities. This technical rule provides that a contingent interest in real property is void unless it must vest, if at all, within 21 years of some life in being at the time the interest was created. Both by statute and at common law, a "life in being" includes a child en ventre sa mère (see, e.g., Perpetuities Act, R.S.A. 1980, c. P-4, s. 1(c)), and this applies whether or not it is

- 15. See, e.g., Family Relief Act, R.S.A. 1980, c. F-2, s. 1(b)(i); Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 1(1).
- 16. (1984), 29 Alta. L.R. (2d) 394 (C.A.).
- 17. Alta. Reg. 352/72, Sched. A.
- 18. For a similar decision see Smith v. Insurance Corporation of British Columbia (1980), 21 B.C.L.R. 317 (S.C.).
- 19. [1933] S.C.R. 456, at 464.
- 20. Supra, note 16, 399.
- 21. Chapman v. C.N.R., [1943] 2 D.L.R. 98 (Ont. H.C.), aff d [1943] 2 D.L.R. 800 (C.A.); Giddings v. Canadian Northern Railway (1920), 53 D.L.R. 3 (Sask. C.A.); Orrell Colliery Company v. Schofield, [1909] A.C. 433 (H.L.).
- 22. See, e.g., Criminal Injuries Compensation Act, R.S.A. 1980, c. C-33, s. 1(1)(c); Compensation for Victims of Crime Act, R.S.O. 1990, c. C.24, s. 1.
- 23. Supra, note 19.
- 24. Ibid., 464.
- 25. (1972), 26 D.L.R. (3d) 418 (Ont. H.C.), *aff d* (1973), 40 D.L.R. (3d) 666 (Ont. C.A.). The position in Ontario is now covered by legislation: Family Law Act, R.S.O. 1990, c. F.3, s. 66.
- 26. B. v. Islington Health Authority, [1991] 1 All E.R. 825 (Q.B.); Watt v. Rama, [1972] V.R. 353 (Vict. S.C); X and Y v. Pal (1991) 23 NSWLR 26 (New South Wales C.A.).
- 27. Supra, note 25, 434.
- 28. (1990), 75 D.L.R. (4th) 668 (B.C.S.C.) aff'd (1992), 94 D.L.R. (4th) 487 (C.A.).
- 29. See also  $Lynch\ v.\ Lynch\ (1992)$ , 25 N.S.W.L.R. (New South Wales C.A.), in which damages of \$2.85 million were awarded to a child suing her mother in respect of prenatal injuries sustained as a result of the mother's negligent driving while pregnant. The court rejected the defendant's argument that a child could not sue its own mother for prenatal injuries because there was "unity of personality" at the time of the negligent act. The court concluded that there was no reason in principle or policy for dismissing the child's claim. The decision was affirmed by the New South Wales Court of Appeal (1992), 25 N.S.W.L.R. 441 (C.A.). See also  $Grodin\ v.\ Grodin\ 301\ N.W.\ 2d\ 869\ (Mich.\ App.\ 1981)$ , which upheld the right of a child to sue its mother in respect of her alleged negligence in failing to seek proper prenatal care.
- 30. On appeal to the British Columbia Court of Appeal, upheld the trial decision, but varied the damages slightly; *supra*, note 28.
- 31. See W.P. Keeton, ed., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul: West Publishing, 1984), 367-70; J.L. Lenow, "The Fetus as a Patient: Emerging Rights as a Person?" *American Journal of Law and Medicine* 9 (1983), 5-10.

- 32. Keeton, *ibid.*, 369. See also B.M. Knoppers, "Physician Liability and Prenatal Diagnosis," Canadian Cases on the Law of Torts 18 (1981): 169-224.
- 33. Keeton, supra, note 31, 369-70.
- 34. See Lavole v. Cité de Rivière-du-Loup, [1955] C.S. 452; Langlots v. Meunter, [1973] C.S. 301; Assurance-automobile-9, [1984] C.A.S. 489; Smith v. Fox, [1923] 3 D.L.R. 785 (Ont. S.C.); Mathison v. Hofer, [1984] 3 W.W.R. 343 (Man. Q.B.).
- 35. There is, however, the possibility of a claim by others, in particular the pregnant woman. While the woman would not be able to recover damages for the wrongful death of the fetus per se (see B.M. Knoppers, "Reproductive Technology and International Mechanisms of Protection of the Human Person," *McGill Law Journal* 32 (1987), 340-41), she might be entitled to damages for any mental suffering associated with the loss: see, e.g., *MacRae v. MacKenzie*, unreported, February 23, 1984 (Ont. H.C.); *Mathison v. Hofer*, supra, note 34; *Morrison v. Novelli*, [1986] B.C.D. Civ. 3359-13 (C.A).
- 36. (1987), 33 C.C.C. (3d) 402, at 414 (Sask. C.A.), appeal dismissed as moot [1989] 1 S.C.R. 342.
- 37. Ibid., 415.
- 38. [1979] Q.B. 276 (Q.B.).
- 39. Ibid., 279.
- 40. [1989] 2 S.C.R. 530.
- 41. R.S.Q. c. C-12.
- 42. [1989] R.J.Q. 1980 (Super. Ct.).
- 43. (1989), 59 D.L.R. (4th) 609 (Que. C.A.).
- 44. *Ibid.*, 613. This statement is conclusory in nature. It was not supported by logic, doctrinal analysis, or policy.
- 45. Supra, note 40, 555.
- 46. Note that the Court was not called upon to decide whether, as a *general* proposition of law, a fetus is a person, but rather whether the Quebec Charter confers this status on a fetus: see in particular *tbid.*, 552.
- 47. Supra, note 19.
- 48. Supra, note 40, 562.
- 49. *Ibid.*, 563, quoting from E.W. Keyserlingk, *The Unborn Child's Right to Prenatal Care: A Comparative Law Perspective* (Montreal: Quebec Research Centre of Private and Comparative Law, 1984), 16.
- 50. See, e.g., Dehler v. Ottawa Ctvic Hospital (1979), 101 D.L.R. (3d) 686 (Ont. H.C.), aff'd (1980), 117 D.L.R. (3d) 512 (C.A.), leave to appeal dented [1981] 1 S.C.R. viii; Medhurst v. Medhurst (1984), 9 D.L.R. (4th) 252 (Ont. H.C.); G. (R.C.) v. Joseph Brant Memorial Hospital (1987), 10 R.F.L. (3d) 379 (Ont. H.C.). In some cases the injunction has been refused without discussion of whether a fetus is a person: see, e.g., Whalley v. Whalley (1981), 122 D.L.R. (3d) 717 (B.C.S.C.); Mock v. Brandanburg (1988), 61 Alta. L.R. (2d) 235 (Q.B.).
- 51. Paton v. British Pregnancy Advisory Service Trustees, supra, note 38; Paton v. United Kingdom (1980), 3 E.H.R.R. 408 (E. Com. H.R.); C. v. S., [1987] 1 All E.R.

- 1230 (C.A.); Attorney-General (ex rel. Kerr) v. T., [1983] 1 Qd. R. 404 (C.A.), aff'd (1983), 46 A.L.R. 275 (Aust. H.C.); Re Marriage of F. (1989), 13 Fam. L.R. 189 (Aust. Fed. Fam. Ct.); Wall v. Livingston, [1982] 1 N.Z.L.R. 734 (C.A.).
- 52. Dehler v. Ottawa Civic Hospital, supra, note 50, 695 (H.C.).
- 53. [1988] 1 S.C.R. 30.
- 54. For a discussion of the concept of a fetus or embryo as a "potential life" see I. Kennedy, "The Moral Status of the Embryo," in I. Kennedy, *Treat Me Right: Essays in Medical Law and Ethics* (Oxford: Clarendon Press, 1988).
- 55. Supra, note 53, 182.
- 56. Supra, note 36.
- 57. Ibid.
- 58. Supra, note 53.
- 59. M.L. McConnell, "Sut Generts: The Legal Nature of the Foetus in Canada," Canadian Bar Review 70 (1991), 556.
- 60. For a detailed discussion see M.M. McCall and G.B. Robertson, "Legal Rights of Children to Health Care in the Common Law Jurisdictions of Canada," in *Canadian Child Health Law*, ed. B.M. Knoppers (Toronto: Thompson Educational Publishing, 1992), 175-78.
- 61. Many writers have taken the view that such intervention amounts to discrimination on grounds of gender as well as an unwarranted violation of the woman's constitutional right to life, liberty, and security of the person: see, e.g., I. Grant, "Forced Obstetrical Intervention: A Charter Analysis," University of Toronto Law Journal 39 (1989): 217-57; S. Rodgers, "Fetal Rights and Maternal Rights: Is There a Conflict?" Canadian Journal of Women and the Law 1 (1986): 456-69; C. Tolton, "Medicolegal Implications of Constitutional Status for the Unborn: 'Ambulatory Chalices' or 'Priorities and Aspirations,'" University of Toronto Faculty of Law Review 47 (1988), 25-31. For other criticisms see T.B. Dawson, "A Feminist Response to 'Unborn Child Abuse: Contemplating Legal Solution,'" Canadian Journal of Family Law 9 (1991): 157-76; S.A. Tateishi, "Apprehending the Fetus En Ventre Sa Mère: A Study in Judicial Sleight of Hand," Saskatchewan Law Review 53 (1989): 113-41. For a contrary view see E.W. Keyserlingk, "The Unborn Child's Right to Prenatal Care (Part I)," Health Law in Canada 3 (1982): 10-20; E.W. Keyserlingk, "A Right of the Unborn to Prenatal Care — The Civil Law Perspective," Revue de Drott de l'Université de Sherbrooke 13 (1982): 49-90; A. Dorczak, "Unborn Child Abuse: Contemplating Legal Solution," Canadian Journal of Family Law 9 (1991): 133-56; J. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth," Virginia Law Review 69 (1983): 405-64.
- 62. This issue also gives rise to the question of whether a child can sue its mother for prenatal injuries sustained as a result of the mother's conduct and lifestyle during pregnancy: see *supra*, note 29.
- 63. C.A.S., Belleville v. T. (L.) (1987), 7 R.F.L. (3d) 191 (Ont. Prov. Ct.).
- 64. Re Children's Aid Society for the District of Kenora and J.L. (1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct.); Re Superintendent of Family and Child Service and McDonald (1982), 135 D.L.R. (3d) 330 (B.C.S.C.). See also Re Simms and H. (1979), 106 D.L.R. (3d) 435 (N.S. Fam. Ct.).

- 65. As to whether this was free and voluntary consent see T.B. Dawson, "Re Baby R: A Comment on Fetal Apprehension," *Canadian Journal of Women and the Law* 4 (1990), 272.
- 66. (1987), 9 R.F.L (3d) 415 (B.C. Prov. Ct.).
- 67. (1988), 15 R.F.L. (3d) 225 (B.C.S.C.). For academic comment supporting the decision see D. Majury, "Annotation: Re 'Baby R,'" (1988), 15 R.F.L. (3d) 225-27; D.W. Phillips, "Case Comment: Re 'Baby R,'" (1988), 15 R.F.L. (3d) 238-43; Dawson, supra, note 65.
- 68. Ibid., 231.
- 69. (1990), 72 D.L.R. (4th) 722 (Ont. U.F.C.). See also G. (R.C.) v. Joseph Brant Memorial Hospital, supra, note 50.
- 70. Re F. (in utero), [1988] 2 W.L.R. 1288 (C.A.).
- 71. See, e.g., Raleigh Fitkin-Paul Morgan Memortal Hospital v. Anderson, 201 A. 2d 537 (N.J. S.C. 1964); Jefferson v. Griffin Spalding County Hospital Authority, 274 S.E. 2d 457 (Ga. 1981).
- 72. Re A.C., 573 A. 2d 1235 (D.C. App. 1990).
- 73. *Ibid.*, 1237. The majority accepted that there may be "truly extraordinary or compelling reasons" to override the woman's decision in cases involving minor intervention, but stated that these cases would be "extremely rare and truly exceptional" (*ibid.*, 1252).
- 74. Family Services Act, S.N.B. 1980, c. F-2.2 [formerly the Child and Family Services and Family Relations Act, S.N.B. 1980, c. C-2.1], s. 1(g).
- 75. Children's Act, R.S.Y. 1986, c. 22, s. 133.
- 76. (1986), 5 B.C.L.R. (2d) 267 (Y.T.S.C.).
- 77. See Canadian Medical Association, supra, note 6, 169.
- 78. See S. Grant, "The Non Human Child," Canadian Journal of Family Law 7 (1988), 177.
- 79. The distinction among property, the right of control, and the objects over which such a right is exercised is often made. See, e.g., Moore v. Regents of the University of California, 249 Cal. Rptr. 494, at 503 (Ct. App. 1988), rev'd in part 271 Cal. Rptr. 146 (Sup. Ct. 1990). There are numerous examples of intangible property. Intellectual property such as copyrights, trademarks, and patents are examples. Patent rights permit their owners to control a sphere of activity relating to the subject matter of their patent, namely, the right to manufacture, use, and sell their inventions for a term of years.
- 80. F.S. Cohen, "Dialogue on Private Property," Rutgers Law Review 9 (1954), 374.
- 81. See W.B. Raushenbush, Brown on Personal Property, 3d ed. (Chicago: Callaghan, 1975), 3-4, where it is stated,

Legal rights have been customarily divided into rights in personam, and rights in rem ... A right in personam is a right which exists only against a determinate person. Thus, if A pays to B \$100 in return for which B promises to convey Blackacre, A has a right only against B to the conveyance of the land in question. No one but B is under any duty to see that the land is conveyed. A right in rem, on the other hand, is one available

against persons generally or, as it is sometimes metaphorically phrased, good against the whole world. Thus, the owner of a given tract of land or of a given chattel has a right against persons generally to the possession and enjoyment of the thing under consideration. In the case of the rights in personam the correlative duty exists only as to a determinate person or group of persons, while in the case of the rights in rem the correlative duty inheres in persons generally ...

Technically speaking, however, contracts do give rise to an enigmatic form of property known as a "chose in action": see E.L.G. Tyler and N.E. Palmer, *Crossley Vaines' Personal Property*, 5th ed. (London: Butterworths, 1973), 11-12, 262-63. The characterization of contractual rights as a form of property does not detract from the general proposition that property rights are rights enforceable against all persons.

- 82. George J.A. in *Moore*, *supra*, note 79 (C.A.), 534, uses this particular example in his dissenting judgment. Not surprisingly (in view of this statement), his conclusion is that persons do not have property in their bodies or in parts severed therefrom.
- 83. That the manner in which an issue is framed can influence its resolution is illustrated by Justice Arabian's extraordinarily negative characterization of Mr. Moore's proprietary theory in the *Moore* case, *supra*, note 79 (Sup. Ct.), 164. He states,

He entreats us to regard the human vessel — the single most venerated and protected subject in any civilized society — as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.

This approach is rejected by Justice Broussard, *ibid.*, 168, who suggests that the "pertinent inquiry is not whether a patient generally retains an ownership interest in a body part after its removal from his body, but rather whether a patient has a right to determine, before a body part is removed, the use to which the part will be put after removal." Justice Arabian's approach is to compare objects, whereas Justice Broussard focusses on the question of right of control.

- 84. In *Moore*, *ibid.*, 164-65, Arabian J. in his concurring opinion asks, "Does it uplift or degrade the 'unique human persona' to treat human tissue as a fungible article of commerce?" The argument that recognizing property in the human body is an assault on dignity is in part premised on the assumption that as a commodity the body or parts thereof would be available in the marketplace for a "price." Pricelessness is the hallmark of dignity. See I. Kant, *Grounding for the Metaphysics of Morals*, trans. J.W. Ellington (Indianapolis: Hackett, 1981), 40-41. See also J. Lavoie, "Ownership of Human Tissue: Life after *Moore v. Regents of the University of California,*" *Virginia Law Review*, 75 (1989), 1387. As the text below indicates, property in the human body does not necessarily lead to the conclusion that it is available for a price.
- 85. For a discussion of this in the context of a free market system for the adoption of children, see J.R.S. Prichard, "A Market for Babies?" *University of Toronto Law Journal* 34 (1984), 352-53. For a forceful discussion of the view that developments in new reproductive technology may lead to the gradual "commodification of reproduction" see C. Overall, "'Pluck a Fetus from Its Womb': A Critique of Current

Attitudes Toward the Embryo/Fetus," *University of Western Ontario Law Review* 24 (1986): 1-14.

- 86. Precisely how much control people should have over these products will vary with each product (e.g., gametes as opposed to embryos or fetuses), the stage of development of these products (zygotes or viable fetuses), and the circumstances in which the control is sought to be exercised (e.g., a "custody" dispute between the progenitors of an embryo, a custody dispute involving a surrogate mother and "adoptive" parents, or an abortion).
- 87. The same view has been expressed with respect to surrogate motherhood—see, e.g., A.W. Latourette, "The Surrogate Mother Contract: In the Best Interests of Society?" *University of Richmond Law Review* 25 (1990), 90. For a discussion of the concept of women as "property" of men see M.L. Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (Princeton: Princeton University Press, 1989), 157-58, 177-81; N. Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982), 17. In the *Moore* case, *supra*, note 79 (C.A.), Justice Rothman acknowledged that the historical evolution of civilization, from a time in which people were regarded as chattels to the outright rejection of such a notion, counsels caution in any case where it is being asserted that a person has property rights in human material. Nevertheless, he felt sanguine in concluding that people have property in their own bodies. He observed (*ibid.*, 504) that "There is, however, a dramatic difference between having property rights in one's own body and being the property of another."
- 88. See infra, notes 90 and 97-98 and accompanying text.
- 89. See C. (J.S.) v. Wren, [1987] 2 W.W.R. 669, at 671-72 (Alta. C.A.), which relies on the leading English case of Gillick v. West Norfolk and Wisbech Area Health Authority, [1986] A.C. 112, at 185 (H.L).
- 90. R. Pound, "The Law of Property and Recent Juristic Thought," *American Bar Association Journal* 25 (1939), 996. The description of standard incidents outlined by Pound is the civilian theory of these incidents. However, this theory accords with the common law approach. For a statement of standard incidents of property based upon common law theory see A.M. Honoré, "Ownership," in *Oxford Essays in Jurisprudence*, 1st ser., ed. A.G. Guest (Oxford: Clarendon Press, 1961), 113.
- 91. Fruits and income, that is, derivative materials, themselves become objects of property subject to the various forms of proprietary control reflected in the content of the standard incidents. Accordingly, agricultural produce of a particular plot of land belongs, absent special circumstances, to the owner of the land. Interest generated by a fund of money belongs, presumptively, to the owner of the fund. Progeny of domestic animals belongs presumptively to the owner of the mother animal. If human beings were objects of property it could be argued that reproductive materials are fruits and income belonging to the human sources that produced them. In the sense that derivative materials are subjected to the bundle of rights that empower the owner of the *corpus*, these materials are capitalized and become accretions to the *corpus*.
- 92. See Honoré, supra, note 90.
- 93. 620 F. 2d 1096, at 1104 (5th Circ., 1980).

94. An example of a landowner's right of exclusion being restricted is the common law pertaining to the right of owners of hotels or inns to refuse to accept guests. They could do so only for good reason such as being fully subscribed or the guest being a danger to the health or safety of the other guests. For a comprehensive discussion of this example and other instances in which landowners have had their rights of exclusion limited, as well as the theory underlying this sort of limitation, see M.M. Litman, "Freedom of Speech and Private Property: The Case of the Mall Owner," in *Freedom of Expression and the Charter*, ed. D. Schneiderman (Toronto: Carswell, 1991), 361 and particularly 364-76.

95. *Ibid.* By "persons of authority" we are referring to peace officers, health or building inspectors, etc.

96. *Ibid.*, where it is also suggested that in the future property rights in commercial property may be limited in deference to the interest in free speech.

97. See McCaig v. Glasgow University, [1907] S.C. 231 (Ct. of Sess.), per Lord Kyllachy, at 242.

98. *Ibid.* That the right of destruction may be abrogated in changed circumstances might have significant implications for a property analysis of reproductive materials. With respect to these materials, policy may support a right of destruction at the early stages of fetal development but not at the later stages.

99. See *Brown v. Burdett* (1882), 21 Ch. D. 667, at 673, where V.C. Bacon struck down a provision in a will requiring trustees to block up the majority of rooms in a mansion house and the rooms in the coachhouse for a period of 20 years.

100. Some might view this statement as heresy or simply erroneous. No doubt it is a hallowed rule of law that it is contrary to public policy to render property inalienable. Both scholars and jurists have expressed the view that a condition attached to a transfer of property that renders the property inalienable is "repugnant" to the right of disposition inherent in the property concept: see Megarry and Wade, supra, note 14, 72; E. Jenks, "An Inalienable Fee Simple?" Law Quarterly Review 33 (1917): 11-14; Re Collier (1966), 60 D.L.R. (2d) 70 (Nfld. S.C.). Accordingly, if X, the owner of Blackacre, transfers property to Y, but on condition that Y not sell, lease, mortgage, gift, or exchange it, the condition will not be valid at law. This result, it is suggested, reflects the standard legal approach, not the inevitable approach in all circumstances. A restraint on alienation is invalid in law only in relation to those objects of property, such as land, that are in fact alienable. Admittedly, most objects are alienable. However, to suggest that the doctrine of restraint on alienation implies that all objects are alienable is going too far. Alienability is a standard characteristic of property, not an inevitable or inherent characteristic. Indeed, as the text associated with notes 102-104, 118, and 126-30, *infra*, suggests, there are several examples of objects that are not alienable or whose alienability is substantially restricted by legislation.

The policies underlying the rule favouring alienability are far more important than the repugnancy rationale (see Jenks, *ibid.*). The right of alienation has an economic justification. Indeed, R. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972), 12, suggests that alienability is an *essential* aspect of an efficient system of property. This is because alienability permits objects of property to rise to their best and highest use. His theory is that market forces will result in an object moving into the hands of the person to whom it is most valuable or in whom the object is most productive. Therefore, to remove an object from the world of

commerce by making it inalienable is potentially to render it less useful than it could otherwise be. It is also said that alienability facilitates dispersal of wealth and provides an incentive for owners of property to make improvements to their property that they might not make if their property could not be disposed of: see D. Mendes da Costa and R. Balfour, *Property Law: Cases, Texts, and Materials* (Toronto: Emond-Montgomery, 1982), 674, note 1.

Even if one assumes that these economic justifications for the existence of the right of alienation are unassailable, they do not preclude competing non-economic interests from trumping the social utility of promoting efficient exploitation of resources. In other words, to focus on a specific example, it may well be that alienability of body parts or reproductive material would result in less wastage of these resources, but the non-economic costs — social, psychological, and moral — may be too high. As well, it has been argued that alienability of bodily tissue would seriously impede medical research and, in the long term, human health. Accordingly, it is our strongly held view that on occasion the reasons favouring inalienability may outweigh the reasons championing the right of alienation. In those circumstances there is nothing to prevent the law from concluding that the object at issue is inalienable. On the contrary, any other conclusion would be irresponsible. It may well be that Posner is correct in positing that alienability is an essential aspect of an efficient property system, but in relation to some objects society may be less concerned with efficiency than with other social goals.

101. D. Waters, "Voting Trust Agreements and the Zeidler Case," *Estates and Trusts Journal* 9 (1988), 63. In light of the general rule that property may not be rendered inalienable, this statement might be viewed as too glib, at least to the extent it suggests that the parties may render property inalienable. However, for the reasons outlined in *supra*, note 100, it is our considered view that Professor Waters' statement is entirely accurate in its suggestion that the law itself may render property inalienable. An example of non-alienable property is the interest of Indian bands in their reserve lands: see the *Guertn* case, *infra*, note 112, for a discussion of this point.

102. See Caratun v. Caratun (1987), 9 R.F.L. (3d) 337 (Ont. H.C) and Coreless v. Coreless (1987), 34 D.L.R. (4th) 594 (Ont. U.F.C.). See also Linton v. Linton (1988), 11 R.F.L. (3d) 444 (Ont. H.C.), which rejects the Caratun and Coreless theory.

103. There is considerable doubt about whether the *Caratun* and *Coreless* cases, *tbid.*, were correctly decided on the substantive issue of whether professional degrees should be treated as property for matrimonial division purposes. However, even if they are wrongly decided, it is suggested that they are not erroneous merely because they imply that property may be inalienable.

104. *Moore*, *supra*, note 79 (C.A.), 504. After making the statement quoted in the text, Justice Rothman stated "that question of policy must be determined by the Legislature." There is an ambiguity in this statement. It could be construed to mean that courts ought not to vary the standard incidents of property and that such variation should be the exclusive prerogative of the legislature. It is suggested that the statement does not go this far. Rather, it should be construed in light of the preceding statement as indicating merely that the legislature ought to resolve the important question (which was not before the *Moore* court) of whether body part sales should be permitted. The California Court of Appeal's conclusion that human

beings' bodily tissue is property was overturned by the Supreme Court of California. This case is discussed in detail *infra*, notes 151-67 and accompanying text.

105. However, this is not to say that it is entirely without consequence. In certain contexts, such as limitation of actions legislation, whether something is or is not property may be very material: see, e.g.,  $Guest\ v.\ Bonderove\ \&\ Co.\ (1988),\ 59\ Alta.\ L.R.\ (2d)\ 86\ (C.A.).$ 

106. See *Philips v. Montreal General Hospital* (1908), 33 Q.S.C. 483, at 489. In that case the court does not actually use the expression "quasi-property," but in describing the property in human remains as "sut generts to which peculiar and limitative qualities attach" the court is clearly subscribing to the concept. This is apparent from a reading of the entire report. At p. 485, Davidson J. states that "full admission may be made that a dead body does not represent property in the ordinary sense of that word." At p. 486, referring to a case in which a decedent's executors succeeded in obtaining an order for immediate delivery of the decedent's remains, he states,

This case makes it quite clear that to say there is no property whatsoever in a dead body, is, in some respects at least, epigrammatic. For on what else, if not on something in the nature of property and on the right to possess it, could the claim of the executors rest, even if the ultimate destination of the property was burial.

To characterize an object as *sut generts* does not necessarily mean that it has some of the attributes of property, though it may. When it does, it is reasonable to characterize the object as "quasi-property." See also *Miner v. C.P.R.*, [1910-11] 3 Alta. L.R. 408, at 414 (S.C.) where Beck J. adopts the following description of property in a corpse enunciated in the U.S. case of *Pettigrew v. Pettigrew*, 207 Pa. 313, 64 L.R.A. 179 (1904): It is "property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise." In the context of that case this too is a description of the concept of quasi-property. See also the U.S. case of *Pierce v. Proprietors of Swan Point Cemetery*, 14 Am. Rep. 667, at 681 (R.I. Sup. Ct. 1872), where the term "quasi-property" is actually used.

107. See *Re Atkins*, [1989] 1 All E.R. 14 (Co. Ct.); *Hunter v. Hunter* (1930), 65 O.L.R. 586 (Ont. H.C.); *Lambert v. Dumais* (1942), B.R. 561 (Que. C.A.); L. Rozovsky, "Death, Dead Bodies and the Law," *Canadian Hospital* 47 (July 1970): 52-55. The right of proper disposition would include the right to donate a decedent's body for medical research and to donate organs for transplant purposes. In both cases the right exists only in the event that the deceased did not during his or her lifetime express wishes to the contrary. The possessory rights vested in the family of a decedent may be the basis of an action seeking compensation for mental or emotional distress suffered as a result of mistreatment of the corpse: see, e.g., *Edmonds v. Armstrong Funeral Home Ltd.* (1931), 1 D.L.R. 676 (Alta. S.C.); *Philips v. Montreal General Hospital*, *supra*, note 106, particularly at 486 and 489. Both are wrongful autopsy cases.

The concept of rights existing for the sole purpose of discharging duties is also evident from the parent-child relationship: see *supra*, note 89 and accompanying text.

108. The leading case on the issue of whether there is property in a corpse answers the question in the negative: see *Williams v. Williams* (1882), 20 Ch. D. 659. At p. 665, J. Kay states this oft-quoted conclusion:

Accordingly the law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried.

109. This approach to characterization is not limited to cases involving property in cadavers. It was adopted by the majority of the California Court of Appeal in the *Moore* case, *supra*, note 79, with respect to the issue of whether people have property rights in their own living bodies. Rothman J.A. answered this question in the affirmative on the basis of the theory that "control means property." He reasoned (*ibid.*, 504-505) as follows:

"property" refers not to a particular material object but to the right and interest or domination rightfully obtained over such object, with the unrestricted right to its use, enjoyment and disposition ... The rights of dominion over one's body, and the interests one has therein, are recognized in many cases. These rights and interests are so akin to property interests that it would be a *subterfuge* to call them something else. [emphasis added]

The Supreme Court of California rejected the conclusion that Mr. Moore should be recognized as having property rights in his body for the purposes of the action he was pursuing. See *infra*, notes 151-67 and accompanying text.

- 110. See Philips v. Montreal General Hospital, supra, note 106, where the court expresses its bafflement with the assertion that a corpse cannot be the subject of property rights.
- 111. In the Australian case of *N.R.M.A. Insurance Ltd. v. B. & B Shipping & Marine Salvage Co. Pty. Ltd.* (1947), 47 S.R. (N.S.W.) 273, at 279, Chief Justice Jordan stated that "*de facto* possession is prima facie evidence of seisin in fee [i.e., outright ownership] and right to possession."
- 112. The use of the term "quasi-property" sends out a clear signal that not all the standard incidents of property are applicable to the object of the quasi-property regime. Its use should eliminate, or at least substantially reduce, any danger of overstating the stature of the property rights involved. It is true that the quasiproperty approach does not eliminate the necessity of drawing an arbitrary line. Instead of separating property and no property, this approach requires a separation of property and quasi-property. However, much less turns on where the latter line is drawn. The term merely connotes in a very general way that not all property rights apply to a particular object. Whenever the term is used, very specific analysis is required to delineate precisely what incidents of control are vested in the holder of the quasi-property rights. In a different but related context (see the discussion pertaining to sui generis interests, infra, notes 114-19 and accompanying text), Dickson C.J. of the Supreme Court of Canada cautioned that going beyond a specific description of the substantive content of the juridical nature of Indian title "is both unnecessary and potentially misleading." See Guerin v. The Queen (1984), 20 E.T.R. 6, at 29-30 (S.C.C).

113. Ibid., 29-30.

114. See Freeborn v. Goodman (1969), 6 D.L.R. (3d) 384, at 405 (S.C.C.).

- 115. Philips v. Montreal General Hospital, supra, note 106, 489. In that case the court described the property in human remains as "sui generis to which peculiar and limitative qualities attach."
- 116. Ibid., 485.
- 117. *Ibid.*, 486. This seems to be the thrust of Justice Davidson's comments on the Qv. Fox case, Q.A. & E. 593, which he discusses at this page.
- 118. Guerin v. The Queen, supra, note 112, 29-30. It is clear that Canadian Indians may surrender their interest to the Crown, who must then deal with the land as a fiduciary for the benefit of the surrendering Indians.
- 119. Supra, note 79 (Sup. Ct.), 156. This rather cynical statement is somewhat unfair. The general law of personal property, like all law, proprietary or otherwise, has been fashioned by policy. Nevertheless, it is true to say that characterizing an object as sui generis opens the door to the achievement of different policy goals that are not achieved by the standard law of personal property. In short, characterizing an object as sui generis avoids preconceptions about the appropriate policies to be served in the regulation of that object.
- 120. There are two types of constitutional constraints that would impair the ability of legislatures to interfere with property. First, legislative jurisdiction over "property" is assigned to the provincial legislatures and not Parliament by the Constitution Act of 1867. However, Parliament may legislate in relation to property as an incidental aspect of its authority over various specified subject areas. For example, Parliament may and does legislate to regulate property as an incidental aspect of its exclusive legislative powers in the field of criminal law — see P.W. Hogg, Constitutional Law of Canada, 3d ed. (Toronto: Carswell, 1992), chap. 18. The Criminal Code provides for offences against property such as theft (ss. 322-34), robbery (s. 343), and breaking and entering with intent (s. 348). Secondly, both Parliament and the provincial legislatures must respect the Canadian Charter of Rights and Freedoms, which forms part of the Constitution. Accordingly, legislation affecting property that abrogates or derogates from one of the rights and freedoms set out in the Charter and that cannot be justified in a free and democratic society may be struck down as invalid. Accordingly, and hypothetically, legislation confiscating all pension funds in Canada might be susceptible to constitutional attack on the theory that such legislation violates the constitutional proscription against laws that interfere unjustifiably with security of the person.
- 121. See, e.g., the petty trespass acts of the various provinces. See also legislation pertaining to wildlife, domestic animals, etc.
- 122. In some cases legislation confers immunity to property owners for conduct relating to the protection of property. The scope of the immunity varies according to the nature of property. It appears, for example, that owners of dwelling houses may go further in protecting their homes than owners of personal property: see the Criminal Code, ss. 38-42.
- 123. Ibid., s. 334.
- 124. The various provisions of the Criminal Code pertaining to these objects are collected in the index to D. Watt and M.K. Fuerst, eds., *Tremeear's Criminal Code* (Toronto: Carswell Legal Publications, 1990), 1303.
- 125. Criminal Code, s. 446(a).

- 126. See, e.g., Liquor Control Act, R.S.A. 1980, c. L-17, ss. 2, 69, 70, 88 and 100.
- 127. See, e.g., Pharmaceutical Association Act, R.S.A. 1980, c. P-7, s. 37.
- 128. See, e.g., Fraudulent Preferences Act, R.S.A. 1980, c. F-18.
- 129. It can be argued that implicit in the title of the legislation "Human Tissue Gift Act" is the notion that human tissue is property. Gift-giving ordinarily implicates or connotes property. However, in a technical (and perhaps artificial) sense this is not a necessary conclusion. It is possible to construe the word "gift" in the title as referring to a gift of service on the part of a donor and not a gift of the object (property). The U.S. Uniform Anatomical Gift Act, s. 7155.6, provides that the "use of any human tissue donated ... for the purpose of transplantation in the human body shall be construed for all purposes as a rendition of a service by each person participating therein and shall not be construed as a sale of such tissue." This provision may well reflect the reality in relation to the various actors involved in a transplantation process with the exception of the donor. That the donor is gratuitously providing more than services is simply a reality.
- 130. The scope of the prohibition is extensive and relatively clear. All human tissue (and "human tissue" is broadly defined) is precluded from being sold. In Canadian common law jurisdictions, blood is exempted from the prohibition against sale: see, e.g., Human Tissue Gift Act, R.S.A. 1980, c. H-12, s. 10. In Quebec, regenerative tissues, including blood, are similarly exempted: see Civil Code of Quebec, article 20. It is reasonably clear, therefore, that in common law provinces the legislation prohibits the sale of all human reproductive materials. One exception is Manitoba, where the legislation expressly excludes reproductive material from the definition of "tissue": see Human Tissue Act, S.M. 1987-88, c. 39, s. 1. In Quebec the ban likely extends to all these materials, though it is somewhat debatable whether male gametes fit outside the proscription of sale of human tissue, because they may be viewed as regenerative in nature. The Uniform Tissue Donation Act 1989, issued by the Conference of Commissioners on Uniform Legislation in Canada, also excludes human reproductive material from the definition of "tissue" for the purposes of the Uniform Act.
- 131. (1981), 27 B.C.L.R. 97 (S.C.).
- 132. [1988] 2 S.C.R. 417, at 432 per La Forest J. (Dickson C.J.C. concurring). The Court also noted that several provinces explicitly vest property in blood samples in hospitals. This point was not considered relevant to the issue before the Court of whether the seizure of blood at the hospital violated the protection against unreasonable search and seizure afforded by s. 8 of the Canadian Charter of Rights and Freedoms.
- 133. Raushenbush, supra, note 81, 4.
- 134. *Ibid.*, 8. In some circumstances people can acquire proprietary rights in light and air. One can own oxygen in a tank used for deep sea diving. In some jurisdictions one can acquire an easement of light that gives a person continuing access to light. However, such an easement does not entitle a person to exclude others from the light.
- 135. The former point is made in Brown on Personal Property, ibid.

- 136. 574 P. 2d. 75, p. 77 (Colo. 1978). The decision in *Graham* was expressly endorsed in the Canadian case of *Whitehead (Burrell) v. Burrell* (1983), 47 B.C.L.R. 211 (S.C.).
- 137. Supra, note 102.
- 138. *Ibid.*, 458, where Killen J. states, "The licence, or the employment it leads to, is fraught with contingencies such as death, illness, dismissal or economic downturn which make its capitalized valuation grossly unfair and unrealistic."
- 139. 337 N.W. 2d 332 (Mich App. 1983). In this case the Michigan Court of Appeals held that a law degree was property and ordered its value to be apportioned upon marriage breakdown.
- 140. Ibid., 335.
- 141. See supra, notes 136-40 and accompanying text.
- 142. Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor (1937), 58 C.L.R. 479 (Aust. H.C.).
- 143. International News Service v. Associated Press, 248 U.S. 215 (1918).
- 144. R. v. Stewart (1988), 63 C.R. (3d) 305 (S.C.C.).
- 145. For a review of some of these policies see Litman, *supra*, note 94, 371. See also *Semayne's Case* (1604), 5 Co. Rep. 91a, p. 91b, 77 E.R. 194, at 195 (K.B.), where Lord Coke rationalizes property in a home as affording individuals "defence" and "repose." Canada, Task Force on Privacy and Computers, *Privacy and Computers*, Report of a Task Force established jointly by Department of Communications and Department of Justice (Ottawa: Department of Justice, 1972) noted the connection between privacy and human dignity, stating (p. 13) that

privacy transcends the physical and is aimed essentially at protecting the dignity of the human person. Our persons are protected not so much against the physical search (the law gives physical protection in other ways) as against the indignity of the search, its invasion of the person in a moral sense.

- 146. The Canadian Medical Association, *supra*, note 6, 45, suggests that human gametes ought not to be regarded as property because they are not the result of "production" in the sense of being the result of "a deliberate, conscious and intentional activity that lies within the control of the individual, both as to nature and direction." This view implies (incorrectly) that production and effort are the touchstones of property, and it ignores the wide range of other policy factors underlying the existence of property.
- 147. M.J. Radin, "Property and Personhood," Stanford Law Review 34 (1982): 957-1015.
- 148. Ibid., particularly 960 and 991.
- 149. The reference to a person's body being too close to personhood to be considered property is to the notion that objects of property are necessarily external to human beings. Blackstone's classic definition of property incorporates this notion of externality. He defines property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe": see Sir W. Blackstone, Commentaries on the Laws of England, vol. 2 (Oxford: Clarendon Press, 1765).

Radin, supra, note 147, 966, reiterates the requirement of externality in the following terms:

the idea of property seems to require some perceptible boundary, at least insofar as property requires the notion of thing, and the notion of thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed from the system.

This analysis assumes that a body is a person and not an external embodiment of a person. If in fact a person is a disembodied mind, a rational, conscious, and immaterial agent, as some philosophers view persons, then human bodies are indeed external, though intimately connected, objects. See Radin, *ibid.*, 962-65, for a discussion of this philosophical view of persons.

- 150. Ibid., 978.
- 151. Supra, note 79.
- 152. The United States Supreme Court subsequently denied a petition for writ of certiorari 111 S. Ct. 1388 (1991).
- 153. Supra, note 79 (C.A.), 504-505. Professor Kennedy, supra, note 54, 134, expresses a similar view with respect to the Report of the Committee of Inquiry into Human Fertilisation and Embryology, *The Warnock Report*, Cmnd. 9314 (London: Her Majesty's Stationery Office, 1984). This issue is discussed further *infra*, notes 252-56 and accompanying text.
- 154. Supra, note 79 (C.A.), 508.
- 155. Supra, note 79 (Sup. Ct.).
- 156. Ibid., 158.
- 157. In the degree and professional licence cases, some courts have concluded that it is preferable to solve the problem of equitable division of the value of a degree by using the law of alimony. This approach avoids the uncertainty and unfairness inherent in the speculative exercise of evaluating the capital worth of a degree: see *Mahoney v. Mahoney*, 442 A. 2d 1062 (N.J. Super. A.D. 1982).
- 158. Even where a property approach is adopted, courts often prefer to avoid difficult policy choices. It will be recalled that J.A. Rothman held that Mr. Moore had property rights in his cells, but refrained from expressing a view on whether such rights included the right to sell. "That question of policy," he noted, "must be determined by the Legislature" Moore, *supra*, note 79 (C.A.), 504.
- 159. Supra, note 79 (Sup. Ct.), 160.
- 160. See, e.g., the judgment of Brandies J. in International News Service v. Associated Press, supra, note 143, and the judgment of Lamer J. in R. v. Stewart, supra, note 144.
- 161. In R. v. Stewart, supra, note 144, 317, Lamer J., in discussing whether confidential information should be treated as property for the purposes of the law of theft, stated.

Indeed, the realm of information must be approached in a comprehensive way, taking into account the competing interests in the free flow of information and in one's right to confidentiality, or, again, one's economic

interests in certain kinds of information. The choices to be made rest upon political judgments that, in my view, are matters of legislative action and not of judicial decision.

162. In his dissent in *International News Service v. Associated Press*, *supra*, note 143, Brandies J. discussed in some detail the advantages of legislative solutions over judicial ones in a case in which a novel property theory is being advanced. Indeed, the majority of the court accepted the plaintiff's theory that it had quasi-property in the news. After outlining several options a legislature could consider with a view to protecting the news gathering and distribution industry, Brandies J. suggested (p. 267) that the legislature might "prescribe the conditions under which and the extent to which the protection should be afforded." He then observed that the legislature might put into place administrative machinery necessary to ensure such protection, and concluded (p. 267) as follows:

Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news, or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred, or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us [that is, the judiciary] to decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear.

See also Foley v. Interactive Data Corporation, 254 Cal. Rptr. 211 (Cal. 1988), where it is stated that "legislatures in making ... [complex] policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties present evidence and express their views." In Tremblay v. Daigle, supra, note 40, 553, the Supreme Court of Canada noted that "decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature."

163. Supra, note 79 (Sup. Ct.), 161.

164. This latter point is made by Justice Pannelli, *ibid.*, 162-63, in the following terms:

If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists.

165. *Ibid.*, 160. The reference to policy in this extract is a reference to all three reasons discussed in the preceding portion of the text. These reasons are summarized in Pannelli J's reasons for judgment immediately following this quotation.

166. The former hypothetical situation involving the development of a cell line for profit might be effectively dealt with on the basis of the law of "unjust enrichment." If so, the wrong could be rectified without treading onto the dreaded turf of property. On the other hand, if human tissue is taken not for profit, it would seem that property theory alone could remedy the wrong. For an introduction to the

basic requirements of an action based on unjust enrichment theory see M.M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust," *Alberta Law Review* 26 (1988): 407-70.

167. E.g., a surrogacy arrangement.

168. Intellectual property statutes, including patents, industrial designs, and copyright, are examples of comprehensive codes.

169. Unreported, 74 Civ. 3588 (U.S. Dist. Ct., S.D.N.Y., April 12, 1978). Part of the memorandum decision of District Judge Stewart is extracted in M.H. Shapiro and R.G. Spece, *Cases, Materials, and Problems on Bioethics and Law* (St. Paul: West Publishing, 1981), 522. For a discussion of the case see B.M. Dickens, "Artificial Reproduction and Child Custody," *Canadian Bar Review* 66 (1987), 65; M.A. Pieper, "Frozen Embryos — Persons or Property?: Davis v. Davis," *Creighton Law Review* 23 (1990), 816.

170. See, e.g., L.B. Andrews, "The Legal Status of the Embryo," *Loyola Law Review* 32 (1986), 367-68; Pieper, *supra*, note 169, 817; E.K. Poole, "Allocation of Decision-Making Rights to Frozen Embryos," *American Journal of Family Law* 4 (1990), 77.

171. J.J. Saltarelli, "Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos," Syracuse Law Review 36 (1985), 1047-48.

172. See M.F. Sublett, "Frozen Embryos: What Are They and How Should the Law Treat Them?" Cleveland State Law Review 38 (1990), 599.

173. Shapiro and Spece, supra, note 169, 527.

174. See supra, note 2.

175. 717 F. Supp. 421 (E.D. Va. 1989).

176. The agreement, in describing the rights and responsibilities of the Yorks in relation to the pre-zygotes, repeatedly used possessory language ("our pre-zygote"); indicated that it was the responsibility of the Yorks to determine the "disposition" of the pre-zygotes; required the Yorks in the event of divorce to determine the "legal ownership" of the pre-zygotes in a "property settlement"; and finally set out three options for the disposition of the pre-zygotes in the event that the Yorks no longer wished to initiate a pregnancy. The three options were donation (on an anonymous basis) to another infertile couple, donation for approved research, and terminal thawing.

177. See L.N. Klar, *Tort Law* (Toronto: Thomson Professional Publishing Canada, 1991), 60-64.

178. The case was subsequently settled and the Yorks were allowed to transfer the frozen embryo to California: see J. Robertson, "In the Beginning: The Legal Status of Early Embryos," *Virginia Law Review* 76 (1990), 463.

179. See Tyler and Palmer, supra, note 81, 70.

180. Ibid.

181. See, e.g., Robertson, supra, note 178, 463.

182. However, there is nothing wrong with the parties opting, by contract, to treat their relationship as a property relationship as long as such an arrangement is not contrary to public policy. If that is all the parties did in the *York* case, the judgment

is sound; but in that event the case does not stand for the proposition that in law pre-zygotes are property for the purpose of bailments.

183. WL 14095 (Tenn. Cir. 1989).

184. A number of writers have pointed out the inconsistency (or absurdity) of concluding that an embryo *ex utero* is a person and thus may not be harmed, but that once it is implanted it can be aborted: see, e.g., Pieper, *supra*, note 169, 828; B.M. Dickens, "Comparative Judicial Embryology: Judges' Approaches to Unborn Human Life," *Canadian Journal of Family Law* 9 (1990), 188-89.

185. Supra, note 183, 25.

186. Ibid., 20-21, where Young J. quotes Senator Gore as stating,

I disagree that there's just a sliding scale of continuum with property at one point along the spectrum and human beings at another. I think there's a sharp distinction between something that is property and something that is not property.

187. *Ibid.*, 16-18. This, of course, was a rather controversial finding of fact. The majority of experts expressed the opinion that the cells were undifferentiated. Justice Young found that "genetic fingerprinting" was capable of establishing differentiation. He concluded (p. 18) as follows:

The Court is persuaded that this relatively new technique opens a tiny window to the world to see and be aware of the most intimate and intricate details of man from his very beginning. The Court finds and concludes that the cells of human embryos are comprised of differentiated cells, unique in character and specialized to the highest degree of distinction.

188. Ibid., 19.

189. Other scientific criteria have been suggested as relevant in determining the existence of human life: see, e.g., J. Rubenfeld, "On the Legal Status of the Proposition that 'Life Begins at Conception,'" *Stanford Law Review* 43 (1991), 620-27; Robertson, *supra*, note 178, 444-45; Kennedy, *supra*, note 54, 121-23.

190. Supra, note 40.

191. Ibid., 552-53.

192. Dickens, *supra*, note 184, 186, describes Justice Young's reasoning as reflecting "fundamentalist pro-life ideology rather than legal learning."

193. See Litman, supra, note 166, 407-408.

194. Robertson, *supra*, note 178, 449, states that "the embryo's legal status will be determined by the importance of competing interests of bodily integrity, procreative choice, and family formation, and not by whether the early embryo is a prenatal subject of rights, or merely a living, human entity that deserves special respect." See also Rubenfeld, *supra*, note 189, 627.

195. U.S.L.W. 2205 (Tenn. App. 1990).

196. See Dickens, supra, note 184, 192.

197. Supra, note 195, 2206.

198. Ibid.

199. Ibid.

200. Ibid.

201. Ibid., emphasis added.

202. See in particular ibid., 2206.

203. Of course, in the United States, based upon *Roe v. Wade*, 410 U.S. 113 (1973), Mrs. Davis's right not to beget children would endure into the pregnancy period.

204. The most obvious basis of such a right would be section 7 of the Charter, which guarantees "the right to life, liberty and security of the person." See in particular the judgment of Wilson J. in R. v. Morgentaler, supra, note 53.

205. The Canadian Charter of Rights and Freedoms has application only to cases involving government or "state action," hence the argument that the Charter is inapplicable in private disputes. See B. Slattery, "The Charter's Relevance to Private Litigation: Does Dolphin Deliver?" McGill Law Journal 32 (1987): 905-23; R. Elliot and R. Grant, "The Charter's Application in Private Litigation," University of British Columbia Law Review 23 (1989): 459-505. However, if the litigation of divorcing parties were based upon legislation such as a provincial matrimonial property act, it could be argued that there is sufficient state action to invoke constitutional analysis; see Litman, supra, note 94, 398-99. If frozen embryos are property governed by the distribution scheme of such legislation, and a court chooses to exercise its statutory discretion to depart from the equal sharing presumption found in the legislation, the deprived party may be able to argue that his or her Charter right to procreative choice has been infringed by the manner in which the court exercised its distributive discretion. Of course, just as the courts have often concluded that fetuses are not persons for various statutory provisions, they can conclude that fetuses are not property for the purpose of matrimonial property legislation. See also infra, note 214 and accompanying text for the proposition that embryos may be regarded as matrimonial property whose ownership may be determined by matrimonial property legislation.

206. In RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at 603, Justice McIntyre wrote,

[the issue of whether the Charter has application to a purely private dispute involving private litigants] is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fail to be decided at common law.

For a discussion of a possible application of the concept developed in this paragraph in a property context see Litman, *supra*, note 94, 379-81.

207. Supra, note 79 (Sup. Ct.), 156.

208. In the judgment of Justice Pannelli in *Moore*, *ibid.*, 156, there appears to be an implicit recognition of the importance of policy factors in determining whether reproductive material ought to be viewed as property, but those policy factors were not analyzed nor was it necessary for the court to do so.

- 209. Some of the implications are possibilities, and not necessarily probabilities. In some cases the pure principles of property do not easily apply. We have exercised some creative licence in relation to these instances.
- 210. Parpalaix v. CECOS, unreported, August 1, 1984 (Trib. gr. inst. Creteil). The case is discussed in detail in D.J. Jones, "Artificial Procreation, Societal Reconceptions: Legal Insight from France," American Journal of Comparative Law 36 (1988): 525-45.
- 211. Of course, the surviving spouse would not necessarily be the beneficiary. Under the terms of a will, any person could be named as the beneficiary of the testator's frozen gametes.
- 212. In *Parpalatx v. CECOS*, *supra*, note 210, the French court expressly rejected the application of inheritance laws to human sperm and also the characterization of sperm as "property." Instead, the court held that the agreement between Mr. Parpalaix and the medical centre imposed a legal obligation on the latter to preserve the sperm and to return it to the person for whom it was intended, namely, Mrs. Parpalaix: see Jones, *supra*, note 210, 528-29. The results of the case (and indeed to a large extent its reasoning) are consistent with a property law analysis, even though the court purported to reject this.
- 213. Under the law of accession the standard rule is that ownership of an item made up of the property of two or more persons is awarded to the contributor of the "principal chattel." The principal chattel is the one that has greater economic value, though some jurisdictions have used the "greater bulk" test: see Tyler and Palmer, supra, note 81, 432. Standard accession principles seem ill-suited to determine ownership of zygotes, and it is difficult to predict with any certainty what the outcome would be if these principles were applied. In our view it is likely that accession law would award joint ownership to the contributors.
- 214. For a discussion of frozen embryos as matrimonial property, see Sublett, *supra*, note 172, 596-97. See also Robertson, *supra*, note 178, 510, who notes that splitting an embryo is likely in the near future.
- 215. Tyler and Palmer, supra, note 81, 432.
- 216. Self-destruction (suicide), while not viewed as a liberty emanating from property in one's own person, is no longer proscribed by law. Like prostitution it is tolerated, not encouraged. No doubt the right to destroy reproductive materials grows increasingly controversial as these materials mature. For most persons the least controversial incident of this right would be the right of individuals to destroy their own gametes. Considerably more controversial would be the right of parties who contribute to the production of a zygote to jointly destroy or authorize the destruction of the zygote or the more mature conceptus. Though women have a right of destruction of their fetuses (a right of considerable controversy at any stage of fetal development), undoubtedly the more mature the fetus the greater the resistance to the right of destruction. As notes 97-98, supra, and accompanying text suggest, property law is capable of moderating or abrogating an owner's right of destruction to accommodate changes in circumstances that give rise to superior countervailing interests. Accordingly, it should not be assumed that property law would support a woman's right to have an abortion.
- 217. A successful plaintiff in a conversion action is entitled to consequential damages, which may include the increased value of the property: see Klar, *supra*,

note 177, 70. In deciding whether the plaintiff should be entitled to the entire increase in value, the court would probably consider other factors, including the extent of the tortfeasor's contribution to the increased value, and whether the tortfeasor acted in bad faith: see *Moore*, *supra*, note 79 (C.A.), 507.

218. The policy questions raised include concerns about (1) the economic exploitation of the poor and the helpless; (2) equality of access to health care; (3) the implications of a body parts market for the integrity of the physician-patient relationship; (4) the implications of individuals profiting from their own body parts for the costs and pace of medical research and, therefore, for the incentive to conduct research; (5) the dignity of human beings when their bodies are not "beyond price"; and (6) the implications of not having a body parts market for the chronic shortage of body parts for transplant and therapeutic purposes. These concerns have been explored extensively in the literature: see, e.g., R.W. Marusyk and M.S. Swain, "A Question of Property Rights in the Human Body," Ottawa Law Review 21 (1989): 351-86; L.B. Andrews, "My Body, My Property," Hastings Center Report 16 (October 1986): 28-38; R. Hardiman, "Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue," U.C.L.A. Law Review 34 (1986): 207-64; W.F. Bowker, "Experimentation on Human Gifts of Tissue: Articles 20-23 of the Civil Code," McGill Law Journal 19 (1973): 161-94; A.L. Caplan, "Blood, Sweat, Tears, and Profits: The Ethics of the Sale and Use of Patient Derived Materials in Biomedicine," Clinical Research 33 (1985): 448-51; R. Weiss, "Private Parts = Private Property?" Science News 134 (1988): 68; R. Weiss, "Forbidding Fruits of Fetal-Cell Research," Science News 134 (1988): 296-98; J. Layoje, supra, note 84; Kennedy, supra, note 54; Warnock Report, supra, note 153.

219. Law Reform Commission of Canada, *Biomedical Experimentation Involving Human Subjects*, Working Paper No. 61 (Ottawa: Law Reform Commission of Canada, 1989), 49-53.

220. A similar recommendation was made in the Law Reform Commission's Working Paper No. 58, *Crimes Against the Foetus* (Ottawa: Law Reform Commission of Canada, 1989), 60.

221. Ontario Law Reform Commission, Report on Human Artificial Reproduction and Related Matters (Toronto: Ontario Ministry of the Attorney General, 1985), 216.

222. Human Fertilisation and Embryology Act 1990, c. 37 (U.K.), s. 3.

223. Medical Research Council of Canada, *Guidelines on Research Involving Human Subjects* (Ottawa: Minister of Supply and Services Canada, 1987), 35.

224. Supra, note 219, 51-52; see also Medical Research Council of Canada, supra, note 223, 34-35. For a detailed discussion of the arguments for and against this type of restriction see Robertson, supra, note 178, 505. For a general discussion of the legal and ethical issues involved in embryo research see P. Singer and H. Kuhse, "Embryo Research," Law, Medicine and Health Care 14 (1986): 133-38; G.J. Annas, "The Ethics of Embryo Research: Not as Easy as It Sounds," Law, Medicine and Health Care 14 (1986): 138-40, 148; J. Robertson, "Embryo Research," University of Western Ontario Law Review 24 (1986): 15-38.

225. Supra, note 219, 52. See also Law Reform Commission of Canada, supra, note 220, 60.

- 226. Human Fertilisation and Embryology Act 1990, ss. 14(3), 14(4) (U.K). However, s. 14(5) provides that these maximum periods may be shortened or extended by statutory regulation.
- 227. Supra, note 221, 217.
- 228. Supra, note 219, 53, and supra, note 220, 61.
- 229. See, e.g., Human Tissue Gift Act, s. 10. In Quebec, all regenerative tissues (including blood) are exempted, and in Manitoba the legislation expressly excludes reproductive material from the definition of "tissue": see *supra*, note 130.
- 230. Infertility (Medical Procedures) Act 1984, No. 10163 (Victoria), ss. 11(6), 12(6), 33.
- 231. Human Fertilisation and Embryology Act 1990, s. 12(e) (U.K.).
- 232. Surrogacy Arrangements Act 1985, c. 49 (U.K.).
- 233. Infertility (Medical Procedures) Act 1984, s. 30.
- 234. A different position was recommended by the Ontario Law Reform Commission: see *supra*, note 221, 218-72.
- 235. Civil Code of Quebec, S.Q. 1991, c. 64, s. 541.
- 236. Human Fertilisation and Embryology Act 1990 (U.K.).
- 237. We have already noted the legal fiction that exists in areas such as property law and succession, whereby a child who is born alive is deemed to have been alive while *en ventre sa mère* if it is in the child's interest to have the fiction applied: see *supra*, notes 11-39 and accompanying text. In the context of succession, this fiction does not produce any significant delay in the administration of estates, since at most the delay will be only as long as the gestation period (until it is determined whether the child is born alive). However, if the fiction were to be applied to embryos *ex utero*, the potential impact on the administration of estates could be considerable, with the prospect of the testator's children being born many years after his death: see the discussion of this point in the *Warnock Report*, *supra*, note 153 at para. 10.9, and in the Ontario Law Reform Commission, *supra*, note 221, 182-83. Some legislators have already acted to ensure that the fiction does not apply to gametes and embryos *ex utero*: see, e.g., Human Fertilisation and Embryology Act 1990, s. 28(6)(b).
- 238. Dickens, supra, note 184, 191-92.
- 239. See supra, notes 93-99 and accompanying text.
- 240. See supra, notes 124-130 and accompanying text.
- 241. Supra, note 195.
- 242. Having regard to the underlying policy concerns evident in the *Davis* case, the right of survivorship would probably be viewed as appropriate, that is, when one of the joint owners died, exclusive ownership of the frozen embryo would pass to the other. However, in view of these same policy considerations, some of the other standard incidents of joint ownership would likely be viewed as inappropriate (indeed, in some cases, impossible) e.g., the right to full enjoyment of the property and the right of severance.
- 243. See supra, note 130.

- 244. See *supra*, notes 97-98 and accompanying text for examples of where the standard right of destruction has been diminished or could be rendered inapplicable.
- 245. Note the observation by Justice Pannelli in the *Moore* case, *supra*, note 79 (Sup. Ct.), 156, that "the laws governing such things as ... fetuses ... deal with human biological materials as objects *sut generts*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property."
- 246. By "common law" we mean non-statutory law; that is, a system of law based on the decisions of courts rather than legislation.
- 247. It is true that a legislative response would not be a guarantee of uniformity, particularly since the legal issues relating to reproductive material lie primarily within provincial legislative jurisdiction and thus legislation might vary from province to province. However, it is likely that there would be considerable pressure for a uniform legislative response, perhaps with the assistance of agencies such as the Uniform Law Conference of Canada, as was done with the human tissue gift legislation.
- 248. Supra, note 40, 553. See also J.W. Hurst, Justice Holmes on Legal History (New York: Macmillan, 1964), 94.
- 249. See supra, notes 160-162 and accompanying text.
- 250. Supra, note 219, 49.
- 251. Warnock Report, supra, note 153, para. 10.11.
- 252. See, e.g., Kennedy, supra, note 54, 131-39; Knoppers, supra, note 35, 345; B.M. Knoppers and E. Sloss, "Recent Developments: Legislative Reforms in Reproductive Technology," Ottawa Law Review 18 (1986), 699-700; Dickens, supra, note 169, 62-63. See also B.M. Dickens, "The Control of Living Body Materials," University of Toronto Law Journal 27 (1977): 142-98.
- 253. Kennedy, supra, note 54, 133.
- 254. Ibid., 134.
- 255. Ibid., 134-35, where Professor Kennedy reasons that the flaw

lies in the fact that while there is to be no right of ownership in an embryo, the very next sentence in paragraph 10.11 states that a couple who have stored an embryo for their own use may have "rights to the use and disposal of the embryo." What, you may ask, is ownership but an abstract concept intended to capture the notion of a bundle of rights that can be exercised over something, and, in particular, the right to use and dispose of something? Thus, while legislating ownership away, the [Warnock] Committee contemplates its reappearance in all but name. It could be said, in response, that paragraph 10.11 makes no mention of sale, so that at least the embryo is res extra commercio if not res nullius, and that the rights of use and disposal are limited to the couple. The difficulty with both these points is that the Committee recommends, in paragraph 13.13, that "the sale or purchase of embryos should be permitted," subject to appropriate licensing procedures. So, if a couple can have a right to use and dispose of an embryo; and a storage agency or even — and this is not clear

— a scientific researcher or establishment can sell embryos, and if embryos may be used for research and thereby (or thereafter) destroyed, it seems to me that you have all the rights and powers commonly associated with ownership — namely, use, alienation, sale, disposal, and destruction. Thus, the recommendation in paragraph 10.11 seems to be jurisprudential nonsense. That is not to say that the Committee did not know what it was doing. It is to say, however, that the means used fail to achieve the desired result. This is not surprising, since the desired result aimed at — namely, that the embryo shall be special and yet not special, more than a chattel yet the same as one — is impossible to achieve.

- 256. Supra, note 79.
- 257. See Robertson, supra, note 178, 454.
- 258. Ibid., 454-55.
- 259. Kennedy, supra, note 54, 124.
- 260. See the discussion of York v. Jones, supra, notes 175-182 and accompanying text.
- 261. Davis v. Davis, 842 S.W. 588 (Tenn. Sup. Ct. 1992).
- 262. Ibid., 597.
- 263. Ibid.
- 264. Hect v. Superior Court (Kane), 20 Cal. Rptr. (2d) 275 (Cal. Ct. App. 1993).
- 265. Ibid., 281, 283.
- 266. Ibid.
- 267. Ibid., 281.
- 268. Re Wishart (1992), 46 E.T.R. 311.

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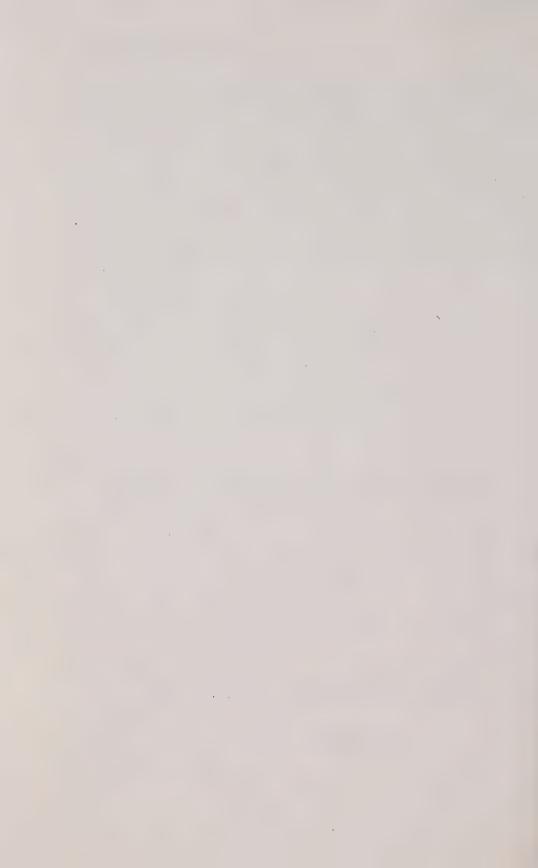
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# New Reproductive Technologies: Commercial Protection

K.M. Cherniawsky and P.J.M. Lown



## **Executive Summary**

This paper describes existing intellectual property law regimes and examines their relative suitability for providing proprietary protection over advances in new reproductive technologies.

The authors outline proposed and existing statutory enactments relating to intellectual property, judicial precedent, and patent office practices in Canada, the United States, Australia, and a number of European states. They also discuss their role in the provision of commercial protection to products and processes of new reproductive technologies.

Ethical issues involved in the commercial protection of these products and processes are addressed and the need for any proprietary scheme is considered.

The paper concludes by exploring the elements necessary to an appropriate model, and considers practical issues involved in the implementation of such a system. Several recommendations and conclusions are offered.

# Part 1 — Introduction

This paper describes certain intellectual property law regimes that are relevant to commercial protection for advances in the field of new reproductive technologies. It is organized into six main parts.

Part 2 outlines the types of products and processes within the mandate of the Royal Commission and provides general information relating to new reproductive technologies.

Part 3 describes the structure of several existing intellectual property law regimes — trademarks and designs, industrial designs, copyright, patents, four hybrid regimes, and trade secrets — and compares their relative suitability as a basis for the provision of proprietary protection over advances in new reproductive technologies.

Part 4 outlines the experience of specific national and international jurisdictions, including Canada, the United States, certain European states, and Australia, regarding the provision of commercial protection to products and processes within the Royal Commission's mandate. Existing statutory enactments and proposed enactments relating to intellectual property, judicial precedent, and patent office practices are discussed.

Part 5 is divided into four subparts. First, the significance of intellectual property rights is reviewed and some ethical issues involved in the provision of any commercial protection for the specified products and processes are identified. Second, whether there is any practical necessity for a proprietary scheme is considered. Third, the elements involved in crafting an appropriate model are explored (see also the paper in this volume by M.M. Litman and G.B. Robertson entitled "Reproductive Technology. Is a Property Law Regime Appropriate?"). Fourth, practical issues involved in the implementation of an appropriate system are reviewed.

Finally, Part 6 outlines conclusions and presents recommendations.

The primary focus of this paper is to create the legal context within which decisions might be made regarding commercial protection for new reproductive technologies. It is not possible to ignore the ethical and moral issues that arise and have an impact within that context. Some are of such fundamental import that they recast the whole of the context. For example, attention is drawn to the effects of prohibition on certain types of research activity; a rule of ownership of body parts or body products by the person from whose body these parts or products were taken would fundamentally realign research practices. The legal context within which decisions on exclusive rights are made should not, and must not, mask the underlying ethical and moral issues; this paper identifies some of those issues.

### Part 2 — Products and Processes

The products and processes that form the potential subject matter of proposed property rights include fetuses and bio-engineered embryos; fetal and embryonic tissues; products derived from fetal and embryonic tissues such as cell lines and genetic materials; and the processes associated with handling, preserving, altering, creating, and using these products. The range of potential products and processes is extremely wide and diverse, including medical treatments, pharmaceutical products, and human beings. In intellectual property law there are no enactments dealing specifically with the new reproductive technologies. For the purposes of intellectual property law, these products and processes are generally considered to fall within the area of biotechnology, which encompasses any innovation involving the purposive manipulation of animate material.

# Part 3 — Intellectual Property Law Regimes

Intellectual property law regimes, in general, create limited proprietary rights in processes and products in order to equitably recognize past efforts or to encourage the investment of scarce resources in the advancement of socially desirable, utilitarian, or artistic endeavours. In this part, the basic principles and protection offered under six intellectual property law paradigms are examined to determine their relative suitability to the biotechnological industry generally, and to the particular products and processes within the mandate of the Royal Commission. The appropriateness of any regime will be determined by its ability to provide adequate protection to a technology characterized by relatively large capital requirements and a unique set of challenges due to the fact that living materials are an integral part of any advances in this area. The six paradigms reviewed are trademarks and designs, industrial designs, copyright, patents, hybrids, and trade secrets.

# Trademarks and Designs

Trademark and design laws were developed at common law to recognize the value of any advantage in reputation or connection that a company may have gained through past efforts or expenditures of money. These laws protect the use of distinctive or differentiating marks, shapes, symbols, or words used in association with, or affixed to, goods and services offered for sale, lease, or hire in the marketplace. This regime does not grant any proprietary rights in the actual products or services offered to the public. Trademark and design laws give the providers of goods and services an exclusive right to use their own distinct market identity, as embodied in a perceivable mark or symbol. The main purposes of this paradigm are,

first, to protect the goodwill of the manufacturer, and second, to protect the public from confusion due to deceptive or misleading advertising.

In Canada, this regime is embodied in the Trade-marks Act.<sup>2</sup> Under

In Canada, this regime is embodied in the Trade-marks Act.<sup>2</sup> Under this act, subject to certain exceptions,<sup>3</sup> any trademark that is not already in use or the subject matter of a pending application by a third party, or that will not be confused with another trademark already in use or the subject matter of a pending application, may be registered.<sup>4</sup> Upon registration, the owner receives the exclusive right to use the trademark throughout Canada. The owner may prevent any unauthorized use of the registered mark, as well as the use of any other mark likely to be confused with his or her mark.<sup>5</sup> The period of exclusivity may be maintained indefinitely if the trademark is used by the owner and the registration is renewed every 15 years in accordance with the Trade-marks Act.<sup>6</sup> The rights conferred under this statute may be licensed or transferred by their owners.<sup>7</sup> In the event of unauthorized use, the owner of a trademark may sue the infringer and recover damages or profits, and obtain injunctive relief and a suitable disposition of the offending articles.<sup>8</sup>

Biotechnological products and processes, including higher life forms, might find some measure of commercial protection under the Trade-marks Act. However, this type of protection would be inadequate as it protects merely the identity of the source of the product in association with which the mark is used. This paradigm does not provide protection based on the underlying structure or function of any particular product.

# **Industrial Designs**

Designs that are used in industrial processes may be protected under the auspices of the Industrial Design Act. Industrial designs encompass any features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye. In a finished article, appeal to and are

An industrial design that is not identical to any previously registered design, nor so similar to a previously registered design that the two may be confounded, is eligible to be registered and receive proprietary protection under this regime. <sup>11</sup> Industrial designs must be registered within one year of their publication in Canada. <sup>12</sup> The designs may be registered by their owners, <sup>13</sup> who must provide a description and a drawing or photograph of the design. Once registered, the designs are made fully available to the public. <sup>14</sup>

Upon registration, the owner is granted the exclusive right to use the design. Any unauthorized application of the design (or a fraudulent imitation thereof) to the ornamenting of an article to which an industrial design may be applied or attached; or any publication, use, sale, or offer for sale of any article to which the design (or a fraudulent imitation thereof) has been applied or attached, constitutes an actionable act of infringement. The act expressly excludes from protection any "features applied"

to a useful article that are dictated solely by a utilitarian function of the article; or ... any method or principle of manufacture or construction."<sup>17</sup> Further, an industrial design cannot be used to protect a process or a method of production.

The Industrial Design Act provides for the recovery of all damages in the event of an infringement. The term of exclusivity under the Industrial Design Act is relatively short compared to other regimes; it lasts for five years, and may be extended for an additional five years. Proprietary rights in industrial designs may be assigned or licensed. The industrial designs may be assigned or licensed.

As the focus of this paradigm is the provision of ornamental rather than utilitarian protection, it is of limited practical value to the developers of products and processes in the realm of new reproductive technologies.

# Copyright

Copyright is an intellectual property law regime that focusses on the creator, as opposed to the result, of the creative process. Under the copyright system, limited exclusionary property rights are granted by statute to the author of any tangible expression of an original work to encourage the author to create and publish that work. It protects only the expression of an idea as opposed to the idea itself. For example, copyright in a book that describes a method of teaching mathematics through the use of coloured rods is not infringed by a third party who produces and sells the rods described in the book. Further, copyright cannot be used to protect any procedure, system, device, scheme, method of operation, concept, principle, or discovery.

To qualify for copyright protection, a work must satisfy two criteria. First, it must be original and not a mere copy of another work. Second, the work must be fixed in the sense that it possesses a degree of permanence that enables it to be perceived and reproduced. (The concept of permanence under the copyright regime is given a very flexible and expansive treatment. It encompasses simultaneous fixation, 24 where the event and the recording of it take place at the same time, such as the recording of a live concert or the videotaping of a live play for broadcast purposes. It also includes cases of works in machine-readable form that can be read or used only with the aid of a machine reader, such as micro-fiche or computer discs.) The requirement to register for copyright varies from one jurisdiction to the next. In Canada, since copyrights come into existence upon creation of the work, registration is not required, but it may help to establish ownership in the event of a dispute. 25 Generally, it is easier for an author to obtain copyright protection than patent protection because the work is not subject to any objective scrutiny as a precondition to the provision of proprietary rights.

Copyright grants authors the right to prevent any unauthorized reproduction, importation, sale, or trade<sup>26</sup> of their work for their lifetime plus 50 years.<sup>27</sup> A copyright may be transferred or licensed by the author

or his successors. Copyright is subject to certain limitations, including compulsory licences. Compulsory licences are granted on terms determined by the relevant authorities in a number of situations; for example, at any time after the copyright arises where the licensee has made efforts but cannot locate the author;<sup>28</sup> after the death of the author if the owner refuses to have the work published;<sup>29</sup> or 25 years after the death of the author.<sup>30</sup> Copyright is also not infringed by "any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary."<sup>31</sup> This system provides a number of remedies in the event of an infringement, including damages, an accounting, profits, costs of the action, and, where appropriate, transfer of ownership in the infringing work.<sup>32</sup>

The concept of work in copyright laws is very broad and encompasses either implicitly, or — as in the case of the Canadian Copyright Act explicitly, scientific expressions. Currently computer software programs are protected under this regime, to somewhat mixed reviews. Some academics have suggested that an analogy can be drawn between computer software and recombinant DNA technology. They suggest that genes, and the proteins produced by genes, are themselves capable of copyright protection.<sup>33</sup> The adequacy of copyright protection for these types of phenomena, in the absence of express legislative direction, will depend on the judicial interpretation of the concept of merger.<sup>34</sup> Proponents of copyright protection suggest that as the idea and its expression are inseparable, one cannot use the idea without infringing copyright on the expression. Opponents of this idea suggest that as it is a basic premise of this paradigm that ideas are to be freely available to all to promote successive creative works, copyright can provide protection only to distinct expressions.<sup>35</sup> Consequently, if the underlying idea or process involved in a recombinant technique is inseparable from the expression of the technique, then copyright is an inappropriate vehicle for recognizing property rights in the technique.<sup>36</sup> In any event, this form of protection does not appear to have been embraced by the biotechnology industry.<sup>37</sup> Indeed, the American copyright office reportedly does not consider genes or protein products capable of copyright protection.<sup>38</sup> Even if inventions in the field of new reproductive technologies have the potential to fall within the copyright paradigm, this regime is probably unsuitable for several reasons.

First and foremost, copyright protects the expression of the work rather than the underlying idea represented in the work (aside possibly from instances where there is a merger of expression and idea). Further, copyright offers no protection from the independent creation of the same work by any third party. Similarly, this system cannot prevent the use of a protected work to create a new work that is not substantially copied from the protected work.

Due to the independent-creation exception to infringement and the subjective and somewhat relaxed nature of the originality criteria, it may be very difficult in practice for one author to successfully prove another author has copied a protected work. Since the allegation of infringement is retroactively evaluated, the problem is compounded — the alleged infringer has full access to the earlier work to minimize its originality and establish the dissimilarity of the subsequent work. Consequently, it may be a relatively simple task to refute the allegation. This is especially troublesome in the area of biotechnology, because once the genetic codes crucial to the existence of an invention are revealed, the underlying idea can be exploited, in a slightly varied fashion, at relatively minimal cost. Therefore, under the copyright regime, an author may in effect disclose commercially valuable information for an inadequate level of protection.

Furthermore, as copyright arises upon creation of a work, priorities of ownership could be difficult to determine, especially if a number of different entities were attempting to produce the same work simultaneously. Finally, an additional problem would exist in certain jurisdictions, such as Canada, where material need not be registered to preserve copyright protection after publication. Lack of registration could create situations in which it would be difficult for authors to determine if their activities might constitute an infringement, or, conversely, to establish that a subsequent author misused a previously protected work.

From the public's perspective, the relatively minimal disclosure requirements (of title, nature, and authorship of work) involved in the copyright regime may not be adequate to enable others to use the work for research during the term of copyright protection or for any purpose after the work has become part of the public domain. Also, in comparison with other intellectual property law regimes, the term of copyright protection is quite lengthy, and in fact is frequently criticized as excessive. The usual copyright term of life of the author plus 50 years may be an inappropriate length of time to grant such exclusionary property rights in a rapidly developing field such as biotechnology and could effectively stifle, rather than encourage, desirable scientific advances.

### **Patents**

The patent regime provides limited proprietary rights in useful "inventions" to encourage the advancement of science and other useful arts, and simultaneously satisfy the public interest in obtaining the complete disclosure of those inventions. The focus of patent law is to "provide an incentive to the evolution of the new and useful, and by the quid of the exclusive privilege granted to the inventor to induce him to present to the public the quo of knowledge which they do not possess."<sup>40</sup>

Patents have been used historically to protect utilitarian, as opposed to artistic, creations. Unlike copyright, patents protect the underlying idea encompassed within an invention. However, patents do not confer upon their holders an unqualified right to practise an invention. <sup>41</sup> A grant of patent gives the inventor exclusionary, as opposed to positive, rights in relation to his or her invention. In other words, the Patent Act grants

patentees and their legal representatives the right to prevent others from making, constructing, emulating, using, or selling the subject matter of the patent<sup>42</sup> or any other subject matter equivalent in law to the patented subject matter. Another invention will be considered equivalent in law if it produces substantially the same result in substantially the same manner. The "doctrine of equivalents" is inherently subjective and can have drastic impacts on the efficacy of patent protection. If the doctrine is applied too liberally, it will unjustly enrich existing patent holders and inhibit scientific advancement. If the doctrine is applied too restrictively, the patent regime will provide inadequate protection and again inhibit the advancement of science.<sup>43</sup> The doctrine must be applied so as to protect genuine advances and prohibit disguised copies.<sup>44</sup> Patents also protect against the independent creation of an invention by any third party.

To obtain patent rights, an inventor must file a patent application with the patent office.<sup>45</sup> In most jurisdictions, the priority of competing claims is determined by date of registration.<sup>46</sup> Canada currently embraces a first-to-file system; however, prior to 1988, priorities were set by a determination of the first and true inventor: the first individual to discover or conceive of an invention, publish or communicate it, and reduce it to practice.<sup>47</sup>

Patent rights may be assigned or licensed.<sup>48</sup> Patent rights in Canada exist for a limited time period of approximately 15-20 years.<sup>49</sup> In some jurisdictions, this period can be extended in certain circumstances,<sup>50</sup> for example, if government approval is necessary prior to the commercial exploitation of an invention.<sup>51</sup>

The scope of patent rights is limited by certain exceptions to infringement for purely non-commercial, experimental, educational, or governmental<sup>52</sup> purposes. Patent rights are also subject to compulsory licensing if inventors abuse their patent rights by failing to work the patent commercially when able to do so, or when failure, irrespective of efforts made by the patentee, will prejudice any trade or industry.<sup>53</sup> Patent rights may be lost through the "doctrine of exhaustion" (or implicit licence). Under this doctrine, by selling the product, the patentee implicitly gives up all rights to use or sell the product. Similarly, if the product can be used only in a patented process, then by its sale the patentee implicitly permits the purchaser to use the patented process.

In the event of infringement, a patentee is entitled to injunctive relief and damages or profits made by the infringement.<sup>54</sup> Also, in appropriate circumstances, the patentee may be entitled to possession of the infringing article.

### Threshold Criteria

It can be argued that although patents bestow the greatest rights of all the property law regimes, they also have the strictest threshold requirements. Furthermore, as the prerequisites of the patent regime were designed over 200 years ago, they do not always fit well with the unique aspects of sciences involving living materials.

This regime has the potential to protect only those products and processes falling within the purview of "patentable subject matter." Patentable subject matter generally includes "any new and useful art, process, machine, manufacture, or composition of matter, or any new and useful improvement in any art, process, machine, manufacture, or composition of matter." A potentially patentable invention must have some anchor to the physical world; mere abstract thoughts, scientific principles, or mental processes belong within the public domain and are not capable of this form of protection. 56

There are four further prerequisites that must be fulfilled before a grant of patent may be issued for any potentially patentable product or process: utility, novelty, unobviousness, and enablement.

Utility

The utility requirement is fulfilled if an invention has a tangible, useful purpose beyond suitability for further research and actually performs the function for which it was invented.<sup>57</sup>

Novelty

The second prerequisite, novelty, requires that the subject matter does not form part of the public realm or prior art. The claimed invention cannot currently be, nor have ever formally been, in public use; it cannot form the subject matter of an existing patent; and it must not have been published prior to the patent claim. The prohibition on prior publication is enforced strictly;58 however, most jurisdictions provide certain grace periods to recognize the practical realities and desirability of free exchange of information in the research industry.<sup>59</sup> The novelty requirement precludes granting monopoly rights over subject matters previously within the public domain, including products of nature, which are considered to be mere discoveries as opposed to inventions. This criterion can create difficulties in the biotechnology area where products of nature are always an integral part of the research and development process. However, this difficulty has been largely overcome in this field by acceptance of the view that patents may be issued for products of nature that have been isolated, purified, or so altered by human intervention that the character of the subject matter of the invention is significantly changed from its naturally occurring counterpart.60

The novelty requirement also affects the scope of available patent protection. If one invents a novel product, then both the product and the process used to produce the product are potentially patentable. If one invents a novel technique to produce an existing product, then only the process can be protected. This can create problems in the new reproductive technologies area: the first to invent a commercially feasible method of production of an existing product may not be able to obtain adequate protection, or may be "blocked" from fully exploiting the grant by the holder of an existing patent over an isolated form of the product. Description of the product.

### Unobviousness

The third prerequisite, unobviousness, is somewhat related to novelty and is by far the most problematic. Not all advances in science are considered worthy of patent protection. To qualify for exclusionary property rights, an advance must involve an element of "inventive genius." Unobviousness is the criterion used to distinguish advances that are truly inventive from those that merely add to the common pool of knowledge or merely enable subsequent inventions.

Inventiveness is an inherently subjective quality, <sup>63</sup> which the courts and legislators have attempted to objectify using the standard of unobviousness. However, unobviousness is also a subjective term incapable of exact definition. <sup>64</sup> To satisfy this criterion an invention must go "beyond what a person of ordinary skill in the art, guided by all the patents and printed publications ... would find obvious to seek and obtain." <sup>65</sup> Unobviousness is evaluated as at the time of the invention, as the courts have recognized that, in retrospect, true inventions often appear to have been obvious. Courts typically use the following criteria to determine whether a particular invention is non-obvious: <sup>66</sup>

- 1. scope and content of the prior art;
- 2. differences between the prior art and the claims at issue;
- 3. level of ordinary skill in the prior art at the time the invention was made; and
- 4. objective evidence of unobviousness, including long-felt need, commercial success, and concurrent attempts by others to develop the same invention.

The concept of unobviousness is also dynamic, because as a science evolves over time, the character of inventions changes dramatically. Typically, a cycle occurs beginning with a huge quantum leap, followed by successively smaller incremental advances. As these increments become smaller and smaller, it becomes increasingly difficult to distinguish those subject matters that are worthy of patent protection from those that fall within the realm of non-patentable basic research. Biotechnological inventions often involve relatively small, but valuable, extensions of an explored area as opposed to totally novel revelations. Consequently, the courts have been forced to rely increasingly on the fourth criterion stated above to support findings of unobviousness. This problem is especially severe in the biotechnological fields, as these sciences often use well-established techniques to produce novel products or commercially viable quantities of useful, isolated, pre-existing substances. <sup>67</sup>

#### **Enablement**

The fourth criterion, enablement, requires that inventors publicly disclose their inventions to enable others skilled in the relevant art to replicate the invention, consistently and at will, and ultimately to build upon the

patented matter. The enablement or disclosure requirement has three objectives: first, to enable others to replicate the invention for research purposes during the patent period; second, to enable others to know when they are infringing the provisions of the grant; and third, to enable public usage of the invention after the term of the patent has lapsed.<sup>68</sup>

Traditionally, the enablement requirement has been fulfilled through the use of a written description. However, in the area of new reproductive technologies, written disclosures may often be inadequate to describe inventions intimately connected to living materials, and access to the actual living material may be necessary to fulfil enablement requirements. To overcome this practical difficulty, many jurisdictions now permit the use of deposits of samples, such as yeast cultures, of viable, stable, living materials as part of the description of the invention. In any event, this requirement is becoming less of an obstacle as the microbiological sciences are becoming more exact and suited to the traditional mode of disclosure through written description.

Despite the strict threshold requirements, inventors in the field of biotechnology (a field that includes advances falling within the Royal Commission's mandate) have most commonly embraced the patent regime to provide protection for their inventions. The preference for the patent regime is undoubtedly due to the relatively wide scope of protection it offers

# **Hybrid Intellectual Property Law Regimes**

There are several examples of hybrid intellectual property law regimes. They are usually developed in response to industry or public dissatisfaction with existing ill-suited or inadequate paradigms. These regimes are custom-crafted to strike an appropriate balance between the interests of society in the disclosure and consequent free availability of a particular technology, and the desires of the innovators in obtaining levels of proprietary protection commensurate with the amount of skill and effort expended on research and development. A range of hybrid regimes exists—from those that impose all the rigours of an existing regime such as patents, plus additional substantive requirements or regulatory provisions, to those that create a novel compromise regime containing certain key elements extracted from existing intellectual property law paradigms.

### **Nuclear Inventions**

Inventions relating to nuclear or atomic energy are an example of the former type of hybrid. Such inventions are subject to all the standard requirements found within the general patent regime. In addition, they are required to conform to several conditions located both within the patent regime itself and in other enactments. Additional limitations on these types of inventions, found within the patent system itself, include limitations on publication or disclosure, restrictions on use, exceptions for government use, and expropriation and limitations on foreign applications.

In the United States, the issuance of patents over subject matter involving nuclear weapons is banned to preserve a government monopoly in the area of defence.<sup>72</sup>

### Food and Medicine

In Canada, inventions relating to food and medicine also fall within this hybrid category. These inventions are also subject to unique restrictions within the Patent Act itself 73 and to additional regulations found in various other enactments. General public concern that the owners of patented drug products were taking unfair advantage of the monopolistic protection offered under the patent regime prompted the government to enact these unique restrictions; that they have been revised on several occasions illustrates the difficulties involved in crafting an appropriate balance of complex competing interests. 74 The most recent revision of these rules occurred in the late 1980s after extensive study involving the Commission of Inquiry in the Pharmaceutical Industry. <sup>75</sup> Currently, provisions within the Patent Act limit both the type of inventions that can be subject to patent protection and the usual scope of patent protection available. Prior to 19 November 1991<sup>76</sup> product patents could not issue in respect of "inventions relating to naturally occurring substances prepared or produced by, or significantly derived from, microbiological processes and intended for food or medicine."77 Protection of these items was previously restricted to product-by-process claims in which the invention relies more on the process by which the end product is produced, and which limits the scope of protection. Since November 1991, however, they can be protected, but although patents may now issue over food and drug subject matters, all such patents are subject to a detailed compulsory licensing scheme.

The scheme attempts to balance the need for commercial exclusivity to encourage capital expenditure for research and development, with the public interest in a freely competitive market environment. Unlike the usual compulsory licences found in the patent regime, these licences are issued irrespective of patentees' efforts to exploit the subject matter of the patent. Patentees can prevent the issuance of a compulsory licence if they can satisfy the commissioner of patents that good reason exists to deny the grant of a compulsory licence.<sup>78</sup> In practice, despite vehement arguments by various patentees, compulsory licences are rarely denied.<sup>79</sup>

Compulsory licences can be granted at any time for inventions relating to food products and processes. <sup>80</sup> In contrast, the licensing scheme relating to medicine is more complex and involves a shortened period of exclusivity ranging from seven to ten years. The exact time frame depends on a number of factors, including the location where the patentee developed, manufactured, and sold the drug as well as the location where the licensee intends to manufacture and sell the generic version. <sup>81</sup> The Patent Act also establishes the Patented Medicines Price Review Board, which controls the prices at which patented drugs can be sold, and which may also reduce the statutory monopoly periods if it sees fit. <sup>82</sup>

Under the terms of a compulsory licence, the licensee obtains the right to work the patent in exchange for payment of a royalty to the patentee. In principle, the royalty should vary to provide a fair return on investment to the patentee. <sup>83</sup> In practice, however, these royalties have been consistently set at a rate of 4 percent of the licensee's net retail selling price. <sup>84</sup>

Canada's compulsory licensing scheme is somewhat unusual. Most other industrial nations treat inventions relating to food and drugs like any other patentable subject matter. In many other jurisdictions, rather than narrowing the scope of protection through compulsory licensing, provisions exist to permit extension of the usual patent term over pharmaceuticals to take into account time lost ensuring compliance with government regulations regarding food and drugs. The future of the Canadian scheme is questionable as, over time, any special provisions that tend to reduce exclusionary rights in this area have been eroded. The government is increasingly being pressured to conform to international standards and provide greater levels of protection over drugs by representatives of the pharmaceutical industry, who insist that these provisions stifle research and development in Canada. There have also been allegations that the compulsory licensing scheme is discriminatory and may accordingly violate the General Agreement on Trade and Tariffs and the Free Trade Agreement.

Subsequent to the completion of this report, Bill C-91 was introduced into the House of Commons. As of the end of 1992, this bill had passed through three readings in the House of Commons and two readings in the Senate. Bill C-91 eliminates the compulsory licensing system and continues the Patented Medicines Price Review Board with modified powers to control the excessive prices charged and the excessive profits earned by manufacturers of patented medicines.

# Plant Breeders' Rights

In the field of plant breeders' rights, unique regimes have been enacted to recognize proprietary interests in novel plant varieties. The first international convention relating to property rights over plants was the International Convention for the Protection of New Varieties of Plants (the UPOV). The convention was concluded in 1961, and revised in 1972 and again in 1978.<sup>87</sup> The UPOV was signed by a number of European countries and created the impetus for the enactment of various domestic protective schemes. These plant breeders' regimes grew out of the common belief that novel plant varieties deserved protection yet were incapable of compliance with the threshold criteria of novelty, unobviousness, and enablement contained in the patent regime. Consequently, systems were enacted to allow agriculture "the same opportunity to participate in the benefits of the patent system as had been given industry, and thus assist in placing agriculture on a basis of economical equality with industry."

The individual schemes vary greatly from one jurisdiction to another, each creating its own version of the optimal balance between the interests

of the public and the individual proprietary rights of the inventor. However, most of these regimes have certain common characteristics. In general, all these enactments contain relaxed threshold requirements and provide less comprehensive proprietary rights than those available under the general patent regime.

### The Canadian Scheme

Canada's Plant Breeders' Rights Act is a typical example of the rights provided under these types of legislative schemes. It provides protection for any new variety of plant. A variety will be considered new provided it satisfies a number of criteria:

- 1. the variety must belong to one of a prescribed set of categories; 92
- 2. the breeder must not have previously sold or concurred in a sale of the variety;<sup>93</sup>
- 3. it must possess at least one characteristic that distinguishes it from other varieties in existence;<sup>94</sup> and
- 4. it must be stable and commercially exploitable to produce a predictable product.<sup>95</sup>

Unlike the enactments in other jurisdictions, 96 the Plant Breeders' Rights Act does not require a sample deposit of the novel variety as a precondition to the recognition of proprietary rights. However, it does require that the holder maintain an adequate supply of propagating material suitable to produce the novel variety throughout the period of registration.97 Successful applicants are granted a certificate that creates an 18-year period98 during which the breeder has the exclusive right to sell, make, or use the propagating material of the protected plant for commercial purposes or to create another new variety. 99 In this manner the regime recognizes the unique ability of self-replication that innovations in this area possess. These rights are subject to the usual research exemption and a "farmer's exemption" permitting farmers to use propagating material, at will, to create new crops for sale. 100 As permitted under the UPOV, the Plant Breeders' Rights Act also contains provisions to create compulsory licences over new varieties whenever the Commissioner considers it appropriate to do so. 101 In the event that an act of infringement should occur, the breeder is entitled to a number of civil remedies, including damages, injunctive relief, orders allowing inspection to facilitate an accounting, and custody or disposition of an infringing subject matter. 102

# Comparison with the Patent Regime

In the United States, where breeders have the ability to choose between the plant breeders' regime and the general patent regime, they often select the patent protection. Their reasoning illustrates the perceived shortcomings of the plant breeders' rights regimes. First, the plant breeders' regimes protect only new varieties; they do not offer any protection based on functional distinctions. In other words, breeders' rights are

inadequate to protect a specific trait that is found in a number of varieties or a plant that has two varieties. Second, a new variety may prove to be a category that is too easy to invent around, as the addition of a single distinctive feature enables a competitor to freely sell a product that may be viewed as a practical equivalent by consumers in the marketplace. Third, plant breeders' rights do not protect processes. Fourth, under the American system, a deposit is mandatory. Fifth, plant breeders' rights protect only the propagating components. Under the patent system the entire plant can be protected. Generally, these complaints reflect that the protection offered under plant breeders' regimes is somewhat inferior to that provided under the patent system.

## Future of Plant Breeders' Rights

In response to advances in technology and the difficulties perceived with the existing scheme, an international conference was held to amend the UPOV Convention in March 1991 (the "1991 Convention"). The amended convention significantly altered the paradigm of plant breeders' rights in a number of areas, which effectively expanded the potential role of the patent regime as a means of protection of novel plants. Plant breeders' rights still apply to homogeneous, stable varieties of plants. However, rather than leaving it up to individual jurisdictions to determine the varieties of plants to be protected, the convention requires members to eventually protect all domestically bred plant species and genera. Unlike its predecessors, the 1991 version sets a minimum proprietary standard and does not dictate the type of paradigm that must be created. In other words, the protection may take the form of a utility patent or some other hybrid interest. Furthermore, alternate protection on longer prohibited.

Under the revised system, the novelty requirement has been slightly relaxed. The convention of 1991 creates a one-year grace period immediately prior to the filing of an application, during which time commercial exploitation of the variety will not destroy its novelty. Registration remains a precondition to the granting of plant breeders' rights, and upon registration, an examination may be conducted by the relevant authority to ensure compliance with the required criteria. Due to practical considerations, the 1991 convention permits breeders to provide evidence of compliance in the form of standardized field tests. In the area of ornamental plants and cut flowers, the new convention increases the allowable ambit of protection from merely propagating materials to the entire plant or any component part thereof.<sup>109</sup>

This convention also permits, but does not require, the enactment of provisions that would extend the protection afforded to breeders to include the products of harvest. This provision is meant to reduce the circumvention of breeders' rights (e.g., misappropriating propagating material and producing crops in another jurisdiction and eventually importing the commercial harvest). The convention retains the "farmer's exemption" and the "breeder's exemption" in somewhat altered forms: the farmer's

exemption may now be limited by domestic enactments;<sup>111</sup> the breeder's exemption is now limited by the introduction of the concept of "essentially derived varieties." The purpose of this provision is to introduce the concept of equivalence and thereby to reduce the ability of subsequent breeders to "invent around" an existing variety by making only slight, non-essential variations. Article 16 of the 1991 convention precludes the operation of the doctrine of exhaustion subsequent to the sale of a protected variety. The convention also increases the term of the breeders' rights.

## **Integrated Chip Topographies**

A novel hybrid intellectual law property regime has also developed in the computer technology field to protect integrated chip topographies. These topographies are three-dimensional representations of the electronic circuits used in semiconductor chips to perform various required functions. This novel form of protection was created in response to industry complaints that existing regimes (copyright and patent) were ill suited to provide adequate protection from serious harm caused by blatant copying and consequent unfair price competition. 114

Innovations in integrated circuitry often require large capital expenditures and great intellectual effort, but are unable to fulfil the novelty and unobviousness criteria of the patent regime. Further, only some innovations in this industry are capable of copyright protection. Even for those innovations, copyright may prove inadequate, as it protects only expressions that can be distinguished from their embodiments. Trade secrecy protection is also inadequate due to the industry-wide practice of reverse engineering to design improved chips.

To overcome the shortcomings in existing intellectual property regimes, several countries (including the United Kingdom, <sup>116</sup> Japan, <sup>117</sup> Australia, <sup>118</sup> the United States, <sup>119</sup> and Canada <sup>120</sup>) have created hybrid law regimes that combine elements from both the copyright and patent systems to provide a more suitable form of protection for the topographies of semiconductor products. <sup>121</sup> International protection for these circuit topographies has been the subject of a treaty of the World Intellectual Property Organization (WIPO) <sup>122</sup> and a Council Directive <sup>123</sup> of the European Economic Community, <sup>124</sup>

### The Canadian Scheme

The Integrated Circuit Topography Act provides a typical example of the protection offered under most of these regimes. Upon registration, the creators of any "original" topography are granted a 10-year period<sup>125</sup> during which they have the exclusive right to reproduce, manufacture, import, or commercially exploit the topography or any substantial part thereof. The scheme involves elements of both the patent and copyright regimes. While this statute does provide protection to the chip itself, it does not protect "any idea, concept, process, system, technique or information that may be embodied in a topography or an integrated circuit product." There are

three threshold requirements for registration: originality, disclosure, and residency.

The originality requirement under this regime is far less onerous than the novelty and unobviousness requirements of the pure patent regime. A topography will be considered original provided that:

- (a) it has not been produced by the mere reproduction of another topography or of any substantial part thereof; and
- (b) it is the result of an intellectual effort and is not, at the time of its creation, commonplace among creators of topographies or manufacturers of integrated circuit products.<sup>128</sup>

The Integrated Circuit Topography Act does not require absolute novelty. A topography is eligible for protection if it is registered within two years of the date upon which it was first commercially exploited. This relaxation was apparently created to reflect a desire to preserve the general atmosphere of openness present in the industry.

The standard of disclosure is also quite relaxed in comparison to the patent enablement requirement. Upon registration, the creator must disclose only information adequate to identify the creator, the date of first commercial exploitation, and one or more titles to identify the topography. Turther, as in the copyright system, the registrar makes no substantive evaluation of the topography, and no examination occurs prior to its registration. The comparison to the topography and no examination occurs prior to its registration.

The scope of exclusionary rights protected under this hybrid law regime is also somewhat less than that provided under the patent regime. The monopoly is subject to the usual exceptions for research, education, and private and non-commercial purposes, and to an additional, unique "reverse engineering" exception to account for standard industry practices. Once the integrated circuit product is made commercially available, competitors may, without fear of sanction, use the protected topography for the sole purpose of analysis or evaluation to create another original topography. This provision is intended to allow legitimate reverse engineering, yet prohibit blatant copying or piracy.

There are a number of remedies for infringement, including injunctions, payment of royalties, recovery of damages (including punitive damages), recovery of lost profits, and disposal of any infringing item. <sup>133</sup> This statute also limits recovery, in cases of innocent infringement, to the payment of royalties subsequent to discovery of the infringement. <sup>134</sup>

## The Future of Chip Protection

The success of this regime remains uncertain. In the United States, there has been very little litigation regarding these rights since the enactment of protection in 1984. Critics contend that despite industry cries for protection, the enactment of this regime was entirely superfluous as, prior to its introduction, the technology had developed to the point where pirating was no longer economically attractive. 135

### **Trade Secrets**

In the absence of an adequate alternate form of protection, the creators of products or processes often attempt to maintain the inherent value of their property through secrecy. Generally, trade secrets consist of product secrets, technological secrets, strategic business information, and compilations. Although currently there are no specific enactments providing proprietary rights in trade secrets, they enjoy some form of civil protection under the common laws relating to contracts and torts, as well as in equity. Under these bodies of law, the owners of trade secrets are protected from the wrongful appropriation of their property by former confidants — for example, employees — provided certain prerequisites are met. The owner must have taken steps to ensure that the information remained confidential and that those who were given access to the information reasonably required it and were aware of its confidential nature.

Trade secrets themselves are not subject to any threshold standards as a precursor to the provision of proprietary rights, and they may be maintained indefinitely. However, trade secrets do not provide protection

Pa	radigm	Trademarks and designs	Industrial designs	Copyright
1.	Subject matter	Distinctive or differentiating marks, shapes, symbols, or words used in association with, or affixed to, goods and services offered publicly.	Original features of shape, configuration, pattern, ornament, or any such combination in a finished article, which appeal to, and are judged solely by, the eye.	Any original literary dramatic, musical, scientific, or archite expression of work

against independent discovery or reverse engineering. In the event of an unauthorized disclosure, the owner may recover injunctive relief, damages or profits, and the delivery of property where appropriate.

If no other commercial protection were afforded to the creators of biotechnological products, they might resort to trade secrecy. This could be problematic for several reasons. First, the public would not receive the benefit of full and enabling disclosure of information, and the progress of this science could be adversely affected — property in trade secrets is lost upon any public disclosure. Second, in the area of biotechnology generally, certain trade secrets could be exceptionally hard to maintain because the end products of such technology are self-replicating. Third, the lack of an adequate protective regime may also result in the redirection of resources from the advancement of the science itself to the maintenance of secrecy, involving the creation of inferior and unstable products incapable of facile replication. In fact, due to heavy regulation and consequent disclosure requirements involved in new reproductive technologies, trade secrecy may not be practical. The suitability of this paradigm of protection hinges entirely on the desirability and practicality of maintaining the secrecy of products and processes involved in the new reproductive technologies.

it	Plant breeders' rights	Integrated chip topography	Trade secrets
nvention; any and useful art, ss, machine, facture, or osition of r.	Any new variety of plant.	Any original topography.	Any valuable information including formulas, patterns, compilations, programs, methods, and processes; or any information contained in any product, device or mechanism over which an element of secrecy has been maintained.

Paradigm	Trademarks and designs	Industrial designs	Copyright
2. Limiting criteria  3. Registration	Distinctiveness: neither the trademark nor the design itself, nor any other trademark or design with which it would be confused, may be in use by a third party.	Originality: the design cannot be identical to, nor so similar so as to be confounded with, a previously registered design.  Novelty: protection must be sought within one year of publication of the design.  Must have a visual effect.  Must not be totally utilitarian.	Originality: very subjective quality; the work cannot be a macopy of an existing (judged in retrospect). Fixed: the work mut possess a degree of permanence, which enables it to be perceived and reproduced.
a) as a pre- condition to the provision of proprietary rights	Optional .	Mandatory	Optional

nt	Plant breeders' rights	Integrated chip topography	Trade secrets
y: the invention have a practical ose and it must ally perform in a ner that satisfies practical purpose.  Aty: the invention not form part of prior art; it cannot reviously pub- d (subject to grace ods), a product of re, or the subject er of a previous t.  Abobious: the ntion must be ntive, go beyond those skilled in art in question d find obvious to and obtain at the	Must belong to a set of prescribed categories (the new UPOV will eliminate this factor).  Novelty: the variety must not have been previously commercially available for sale.  Distinctiveness: the variety must possess at least one characteristic that distinguishes it from other varieties.  Stability: the variety must produce stable, predictable products in commercial quantities.	Originality: the topography must not be a mere reproduction of another topography or any substantial part thereof and it must be the result of intellectual effort (not "commonplace" at the time of its creation).  Novelty: protection must be sought within 2 years of commercial exploitation.	Secrecy must be maintained with respect to the commercially valuable information.
of invention.  blement: the nation must be able of description manner that alles others skilled a art to conntly replicate it.			
datory	Mandatory	Mandatory	No

Pa	radigm	Trademarks and designs	Industrial designs	Copyright
b)	substantive disclosure on registration	A copy of the trademark or design itself must be provided.	A description of the design, and a drawing or photograph, must be provided.	A copy of the work be provided.
c)	substantive examination on regis- tration	Yes	Yes	No
4.		Exclusive right to use trademark or design in the marketplace, plus the right to prevent others from using a copy of the trademark or design or any other trademark or design that could be mistaken for the protected property.	Exclusive right to use the design, plus the right to prevent others from attaching the design or a copy thereof to any article, or offering any article to which the design or a copy thereof has been attached to the public.	Exclusive right to pu a work, plus the righ prevent any unauthor reproduction of the expression or any substantial part there
	Term of protection			Generally, life of the author plus 50 years.

nt	Plant breeders' rights	Integrated chip topography	Trade secrets
tten description uate to enable s skilled in the fic art to replicate vention consis- and at will be provided.**  posit may also mpany the written iption.	Written description required; no deposit is necessary; however, the breeder must maintain adequate propagating material to produce the new variety throughout the term of protection.	Information sufficient to identify the topography must be provided.	N/A
	Yes	No	N/A
sive right to ise the invention, the right to int any thorized use of ivention or any alent invention.	Exclusive right to sell, make, or use propagating material of the new variety for commercial purposes or for the purpose of creation of another novel variety, plus the right to prevent any unauthorized use, production, or sale of the propagating material for this purpose.	Exclusive rights to commercially exploit the topography and resultant chip product, plus the right to prevent unauthorized piracy.	Right to prevent unauthorized disclosure of the secret.
ars generally.*	18 years.	10 years.	Indefinite if the secret is maintained and not produced independently.

# Comparison of Canadian Intellectual Property Law Paradigms (cont'd) Industrial Trademarks and Copyright designs designs **Paradigm** 6. Limitations on protection a) independent Not an exception. Not an exception. Excepted from protection. creation No exemptions. Exemptions for "fair No exemptions. b) use dealing," which inclu reproduction for priv study, research, criti review, or newspape summary. c) compulsory No No Yes, in certain instar licences where the owner ref to publish the work.

Comparison of C	anadian Intellectual	<b>Property</b>	Law Paradigms	(cont'd)
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Paradigm		Trademarks and designs	Industrial designs	Copyright	
7.	Purpose of regime	To provide a monopoly over identity in the commercial market-place.	To provide a limited monopoly over identity in the commercial marketplace.	To encourage the creation and publica of works of art.	

- \* Compulsory licences of right are provided for pharmaceutical products anywhere from time of issuance to 10 years after issuance depending on where the drugs are developed and marketed. However, this compulsory licensing scheme will be eliminated in Bill C-91.
- \*\* This requirement is modified in relation to inventions involving nuclear energy.

# Part 4 — International Survey of Existing Intellectual Property Regimes

### Introduction

All of the surveyed jurisdictions (namely, Canada, the United States, Australia, and Europe) have statutory patent regimes. Although the laws vary from one jurisdiction to another, these regimes contain many similarities, which is consistent with the current international trend to recognize increasing levels of commercial protection for intellectual property. <sup>137</sup> Further, many of the jurisdictions have recognized the great social and economic importance of the biotechnology industry. <sup>138</sup> Not surprisingly, all of the countries have enacted patent legislation with the potential to provide commercial protection to at least some of the biotechnological materials and processes involved in new reproductive technologies.

Generally, protection is provided to microbiological inventions within the various generic patent regimes. However, none of the reviewed enactments expressly allows patent protection over higher life forms. In fact, many jurisdictions expressly forbid the patenting of plant and animal varieties and the essentially biological processes used to produce them. Consequently, specific quasi-patent regimes have been enacted to protect certain types of higher life forms. The general patent provisions in place in the United States and Australia prohibit grants of patents relating to

Subsequent to the completion of this report, Bill S-17 was introduced and passed the part of the Senate. This bill includes various procedural and substantive uses to almost all Canadian intellectual property regimes.

human beings. The various patent statutes also commonly prohibit the granting of patents with illicit purposes or in contravention of the public order or morality. In several countries, medical treatments are not considered to be patentable subject matter due to express prohibition or judicial precedent. This exclusion relates to the belief that medical treatments do not possess an industrial or commercial purpose.

The patentability of products and processes in the new reproductive technologies field is also greatly affected by the fact that patents confer exclusionary rather than affirmative rights to practise inventions. Many jurisdictions have enacted legislation to control, and in some instances to ban, the use of human fetuses and embryos and their tissues for non-therapeutic research purposes. These substantive restrictions greatly restrict the potential for innovation in this area and consequently the practical need for intellectual property protection.

### Canada

Canada provides a less complete system of intellectual property protection to biotechnological inventions than many other nations. Unlike the current international trend to increase the ambit and adequacy of property rights over living matter, recent judicial decisions and current Canadian Patent Office practices appear to place even more restrictions on the types of inventions connected to living matter that can be commercially protected. In Canada, two statutes exist that provide commercial

protection to inventions involving living matter: the Patent  ${\rm Act}^{140}$  and the Plant Breeders' Rights  ${\rm Act.}^{141}$ 

Section 2 of the Patent Act defines the scope of patentable subject matter or inventions for which patents may be granted. It provides that

"invention" means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter.

The ambit of Section 2 is narrowed by Section 27(3), which precludes the granting of a patent for any invention with an illicit object or for any mere scientific principle or abstract theorem. The scope of patentable subject matter is also modified by the rather strict and explicit disclosure requirements embodied in Section 34 of the Patent Act.  $^{142}$ 

## Re: Application of Abitibi Co.

The first significant Canadian ruling regarding the patentability of life forms was a decision of the Patent Appeal Board and the commissioner of patents in Re Application of Abitibi Co. 143 The inventors sought to patent a process to eliminate toxic waste products produced by the pulp industry and the actual yeast culture involved in this disposal process, which was described as a microbial system having five principal fungi components. The patent office examiner at first denied the product claim on the basis that living or viable matter did not fall within the purview of Section 2 of the Patent Act. An appeal from this ruling was heard by the Patent Office Appeal Board and the commissioner of the patent office soon after the landmark ruling of the United States Superior Court in *Diamond v. Chakrabarty*, 144 which held that non-naturally occurring living products could be patented as either "manufactures" or "compositions of matter" within the meaning of the American Utility Patent Act. 145

The Canadian Patent Appeal Board first acknowledged the *Chakrabarty* decision and the fact that several other industrial jurisdictions were allowing patents to issue in respect of microbiological products. The board then took notice of the long-standing practice of the Canadian Patent Office of granting patents for microbiological processes. Based on all this, the board concluded that living inventions themselves could be patented if three circumstances were met: (1) the invention must not have existed in nature; (2) the invention must carry out some known useful objective; and (3) the invention must be sufficiently different from known species that it could be said its creation involved the necessary element of "inventive ingenuity."

According to the board:

Certainly this decision will extend to all micro-organisms, yeasts, moulds, fungi, bacteria, actinomycetes, unicellular algae, cell lines, viruses or protozoa; in fact to all new life forms which are produced *en masse* as chemical compounds are prepared, and are formed in such large numbers that any measurable quantity will possess uniform

properties and characteristics ... We can see no justifiable reason for distinguishing between these life forms when deciding the question of patentable subject-matter. Whether it reaches up to higher life forms — Plants (in the popular sense) or animals — is more debatable.  $^{147}$ 

The board made additional obiter (incidental) comments that tended to support the view that higher life forms could also fall within the category of patentable subject matter:

With still higher life forms it is of course less likely that the inventor will be able to reproduce it at will and consistently, as more complex life forms tend to vary more from individual to individual. But if it eventually becomes possible to achieve such a result, and the other requirements of patentability are met, we do not see why it should be treated differently. 148

The board also made obiter comments suggesting that the disclosure requirements of Section 34 of the Patent Act could be fulfilled by the deposit of a viable sample in an appropriate depository. However, the board did advocate the use of both a written description and a deposit to ensure compliance with the statutory enablement requirement. This decision illustrates that the key consideration relating to enablement should be to ensure that the benefits to be derived from the invention will not be lost to the public. 149

# Practice Following the Abitibi Decision

The initial optimism regarding the patentability of higher life forms caused by the comments in the Abitibi decision was quite short-lived. Subsequent to this ruling, the patent office continued to maintain its policy of refusing to grant patents with respect to plants and animals.

### Pioneer Hi-Bred

In 1985, consistent with this established practice, the patent office refused an application to patent a novel variety of soybeans brought forward by Pioneer Hi-Bred. First the patent examiner, and later the Patent Appeal Board and the commissioner of patents, refused the patent application on the basis that the novel plant variety did not constitute an "invention" within the meaning of Section 2. The decision was again appealed and the patentability of complex life forms came before the Canadian judicial system for the first time.

# The Federal Court of Canada Appeal Decision

The Federal Court of Canada Appeal Division<sup>152</sup> affirmed the earlier rulings and held that the plant was not eligible for patent protection. The majority decision was delivered by Mr. Justice Marceau. He noted that until recently it was assumed that life forms could not be patented, but then conceded that the Canadian Patent Act did not necessarily preclude the patenting of life forms. However, he was of the view that traditionally crossbred plants could not be considered "compositions of matter" or "manufactures" within the meaning of the act. Mr. Justice Marceau found

support for this position in the fact that the act did not specifically refer to any of the technical jargon commonly associated with the art of cross-breeding.

Mr. Justice Pratte of the Federal Court of Appeal concurred with the reasons given by Mr. Justice Marceau and gave additional reasons to deny the patent, which had not been previously raised or argued before the Patent Appeal Board. In his view, the invention involved a "degree of good luck" and consequently could not meet the enablement requirements outlined in Section 34 of the Patent Act. According to Mr. Justice Pratte, the Patent Appeal Board's comments regarding deposits as a method of enablement were incorrect. He held that to satisfy the requirements of Section 34, a third party must be able to replicate the invention using the written description alone. This aspect of the decision is especially restrictive in the biotechnological area as the starting materials are often composed of unusual living materials. In many instances replication without resort to a deposited sample could be economically prohibitive or practically impossible.

The Supreme Court of Canada Decision

The case was appealed to the Supreme Court of Canada, <sup>153</sup> where it was hoped that some clear guidelines regarding the patentability of animal subject matters would be established. Mr. Justice Lamer delivered the decision of the Court and stated that the appeal raised two fundamental issues: first, whether or not an artificially crossbred plant represented a patentable invention, and second, whether the specification fulfilled the statutory disclosure requirements.

With respect to the first issue, the Court seemed to draw a distinction between traditional crossbreeding techniques and recombinant DNA techniques on the basis that the former have long been considered unpatentable discoveries as they merely follow the natural rules of reproduction. However, Mr. Justice Lamer did not ultimately rule on the issue of patentability, deciding instead to deny the patent on the second basis for failure to make adequate disclosure. He expressly refused to comment on the correctness of Mr. Justice Pratte's view regarding enablement, but his ruling does not appear to be as restrictive as the decision of Mr. Justice Pratte. According to Mr. Justice Lamer:

the inventor must describe not only how the invention can be used but also how a third party can make it; nowhere does it say that the deposit by itself of a sample of the invention will meet the disclosure requirement.<sup>154</sup>

He concluded that while in some instances a deposit might be of assistance to meet the disclosure requirements, in this case it could not save an otherwise incomplete disclosure.

## Life After the Pioneer Hi-Bred Decision

Subsequent to this decision, academic views of the patentability of higher life forms in Canada have been divided. According to some academics, higher life forms can be patented if their written disclosure is very detailed and is accompanied by a viable deposit. However, others are of the view that this decision effectively precludes the granting of patents in relation to plants. Most academics agree that in view of the general reluctance of the courts to set guidelines and the inconsistent precedents, there is a need for legislative intervention in this area.

## Patent Office Practice

The Canadian Patent Office, bolstered by the opinion of the federal court of appeal in *Pioneer Hi-Bred*, continues to adhere to the view that plants and animals themselves are not patentable subject matter. However, according to the 1991 patent office practice manual, processes may be:

Processes for producing plants and animals which require significant technical intervention by man may be patentable. Traditional biological breeding processes used for the production of plants and animals are considered essentially natural biological processes and are not patentable. <sup>159</sup>

The patent office will grant patents over "new microbial life forms such as bacteria, yeast, moulds, fungi, actinomycetes, algae, cell lines, viruses and protozoa" subject to the disclosure requirements in Section 34 of the Patent Act. The patent office also requires the submission of complete written descriptions in addition to any deposited sample. <sup>161</sup>

### Other Considerations

Even if it had been clearly decided that life forms in general and the processes used in conjunction with their production were patentable subject matter, other considerations would affect the level of protection available. For example, if a particular process could be described as a medical treatment, Canadian jurisprudence would preclude the issuance of any patent. <sup>162</sup> If the invention related to "naturally occurring substances prepared or produced by, or significantly derived from, microbiological processes and intended for food or medicine," then, until recently, the product could only be claimed through a product-by-process claim. Such claims are currently subject to the mandatory licensing scheme provided for in the Patent Act. <sup>163</sup>

The present state of the law in Canada in relation to the patenting of life forms is less than clear. Despite recognizing a need for a suitable and comprehensive system of protection for inventions in the biotechnology field, <sup>164</sup> the Government has not undertaken any specific reforms in relation to commercial protection in this area. Further, the Supreme Court of Canada has expressed reluctance to provide general guidelines in this area. It appears that patents will be granted for essentially microbiological

processes and products; however, in the absence of any legislative amendments to the Patent Act, attempts to patent higher life forms (which would include embryos and possibly derivative tissues) will be resisted by both the patent office and the federal court of appeal.

### The United States

The federal government is empowered by the constitution to promote the progress of science and useful arts through the granting of exclusive property rights of limited duration to authors and inventors. Patent and quasi-patent protection is available for living organisms under the Plant Protection Act, <sup>165</sup> the Plant Variety Protection Act, <sup>166</sup> and the more general Utility Patent Act. <sup>167</sup>

Section 101 of the Utility Patent Act is equivalent to the Canadian Patent Act and defines patentable subject matter as "any new and useful process, machine, manufacture, or composition of matter or any new and useful improvement thereof." However, unlike their Canadian counterparts, American biotechnological inventors have experienced great success in convincing authorities with the patent office and the judiciary that their inventions belong within the purview of the utility patent regime.

### Diamond v. Chakrabarty

Public discomfort with the rise of recombinant genetic techniques in the 1970s spurred great debate in the United States and elsewhere as to the advisability and patentability of technology involving living organisms. 168 The first decision to resolve the doubts regarding the limits of the patent regime was Diamond v. Chakrabarty. 169 Chakrabarty had developed a strain of bacteria with characteristics not found in nature. The inventor hoped that the unicellular organism could be mass-produced and used to degrade crude oil spills. The patent office examiner initially denied the application on the grounds that the strain of bacteria was merely a product of nature and also a living organism. The Patent Appeal Board partially overruled this decision and held that, although it was not a product of nature, the strain of bacteria did not constitute patentable subject matter because it was a living creature. This decision was further appealed to the U.S. Federal Circuit Court where, by a slim majority of five judges to four, it was determined that patentable subject matters could not be limited to inanimate products.

The court was of the view that the Utility Patent Act had been designed to have a very wide application and was to include anything under the sun "made by man." Further, any product that possessed characteristics markedly different from those it possessed in nature comprised a patentable subject matter. The court decided that the strain of bacteria in question fell within the categories of "manufacture" and "composition of matter." The relevant distinction to determine patentability was "not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions." The court also

ruled that the existence of legislation specifically designed to provide protection over living products did not preclude patenting under the utility patent regime. Finally, according to the court, policy concerns such as potential environmental hazards posed by these inventions were best left to elected government officials and should not be considered by the judiciary in determining the limits of the existing patent regime. <sup>171</sup>

## Higher Life Forms

Two subsequent decisions of the Patent Appeal Board have confirmed the patentability of multicellular plants<sup>172</sup> and animals<sup>173</sup> under Section 101 of the Utility Patent Act. In *Ex Parte Hibberd*, a patent was granted for a novel variety of corn possessing abnormally high levels of amino acids, despite the existence of other statutory regimes under which the corn could be protected. In *Ex Parte Allen*, the Patent Appeal Board ruled that it was possible to patent polyploid oysters possessing an extra set of chromosomes that resulted in unusually large and sterile animals.

## Patent Office Policy

The United States Patent and Trademark Office recognized these developments and published a change of policy in its Official Office Gazette in April 1987. The official notice stated that the office would now consider all "nonnaturally occurring non-human multicellular living organisms, including animals, to be patentable subject matter within the scope of 35 U.S.C. 101." It also explained that any "manufacture or composition of matter occurring in nature will not be considered patentable unless given a new form, quality, properties, or combination not present in the original article existing in nature." No explanation or definition of the term non-human was provided in this notice, and no indication was given of exactly how human an organism could be before it would be rejected as comprising a non-patentable subject matter. The restriction was included in the release to ensure that grants of patent could not possibly violate the constitutional prohibition on slavery. The exact parameters of human in this context are vitally important, as human genes are the genes most frequently inserted into animals in the creation of transgenic animals. 175

# Transgenic Animals

In April 1988, the first patent over a transgenic animal was issued. U.S. Patent No. 4 736 866 granted inventors from Harvard University a monopoly over any transgenic non-human animal, especially a mouse, whose germ cells and somatic cells contain a particular activated oncogene sequence. The patent protection applied to all animals whose natural genetic make-up had been altered by the micro-injection of a particular human gene that made the animals abnormally susceptible to cancer.

The publicity received by this patent created great political debate. It was the impetus for the introduction of a number of bills into both the Congress and the Senate that would have either temporarily or permanently banned the issuance of patents over transgenic animals.<sup>176</sup>

However, none of the proposed moratoriums ever became public laws and most died in committees. 177

One of the proposed bills concerning transgenic animals lasted longer than any of the proposed moratoriums, but it appears not to have been reintroduced into the current session of the Congress or Senate. This bill, The Transgenic Animal Reform Act, 178 rather than banning the issuance of patents covering transgenic animals, confirmed the legitimacy of such patents subject to certain regulations. The bill had four basic provisions. First, it created an experimental use/infringement exemption for noncommercial experimentation or use in relation to the premarket approval process. Second, it created a "farmer's exemption" similar to that found in the plant breeders' enactments. Third, it amended the federal patent application legislation to authorize deposits in satisfaction of disclosure requirements. Fourth, it confirmed that human beings cannot form the subject matter of any grant of patent.

### Judicial and Legislative Response

Since the United States has become a leader in the biotechnology field, numerous patents have issued out of the U.S. patent office relating to processes in living organisms and materials, including human cell lines, tissues, and proteins. Consequently, the judiciary and the elected officials in the Senate and Congress have been forced to face the difficult task of reconciling general patent principles with the unique characteristics of biotechnological products and processes. The judicial decisions in this area have been result-oriented in some instances, creating a somewhat unpredictable situation and, occasionally, the impetus for remedial legislative action.

# Judicial Consideration of Obviousness

Some of the most significant problems relating to biotechnological inventions have occurred in the area of obviousness of inventions involving standard processes. <sup>180</sup> In these cases, the federal courts have generally followed the usual threshold criteria <sup>181</sup> and have further determined that an invention will not be considered obvious if one of the following conditions is met:

- 1. there was no reasonable expectation of success; or
- 2. undue experimentation would be required to make the invention  $\dots$ ; or
- 3. the experiment involved an area where the prior art disclosed only general guidance as to the invention in question.<sup>182</sup>

In the case of *In Re Durden*, <sup>183</sup> the Federal Court of Appeal held that novelty and unobviousness in a specific starting material and end product do not necessarily import patentability to an otherwise obvious process used to create the end product from the starting material. <sup>184</sup> Prior to this decision, it was felt that novelty and unobviousness of either the starting materials or the end products involved in an invention imported both

novelty and unobviousness to the related process.<sup>185</sup> This decision could create an insurmountable obstacle to patenting in the biotechnological field, where the truly innovative step in research and development can be the isolation or creation of a novel starting product that is subsequently transformed into a commercially valuable end product through a relatively standard technique.<sup>186</sup> In *Durden*, the court was dealing specifically with a chemical process and the justices expressly pointed out they did not wish their decision to have universal application. However, the decision has been expanded and subsequently applied on a regular basis to deny process patents over biotechnological process inventions.<sup>187</sup>

Two subsequent decisions added further confusion to the criterion of unobviousness in relation to process claims. First, in the case of *In Re Pleuddemann*, <sup>188</sup> the Federal Circuit Court followed the pre-*Durden* reasoning and distinguished *Durden* on the somewhat questionable ground that it applied to processes directed to *making* a product rather than processes directed to *using* a product. <sup>189</sup> In any event, following the *Pleuddemann* decision the patent office continued to routinely deny process patents on the basis of the *Durden* decision. <sup>190</sup> Second, in the case of *In Re Dillon*, <sup>191</sup> the federal appeal court passed up an opportunity to expressly overrule the *Durden* decision, but did determine that *Durden* was not authority for a *universal* rule that the unobviousness of starting materials and end products automatically import unobviousness to a process. <sup>192</sup>

## Infringement and Breadth of Claims

The American courts are also grappling with the difficult and technical issue of the appropriate scope of protection that should be afforded patents and the related issue of the application of the doctrine of equivalents in a manner that will provide adequate rights to both the inventors of first generation and those of subsequent generations of inventions. An appropriate balance is necessary to ensure that the patent system meets its fundamental objective of advancing scientific knowledge for the benefit of the public and to prevent stifling the industry as a whole. 194

In the biotechnology area, infringement problems arise when a number of parties are simultaneously trying to solve the same problem and are racing to develop a patentable subject matter to ensure some measure of practical monopolistic market control over the eventual solution. Often one party will obtain rights in an isolated product, while another party will be the first to invent a method to commercially produce essentially the same product. In such a situation the parties must either mutually agree to a licensing arrangement or resort to patent litigation. This problem is also compounded by the fact that it can be quite easy to "invent around" a biotechnological invention because changes in the structure of a biological product do not always result in significant changes in functions that the final product performs. There have not been many cases in this area, and the results have been mixed due in part to the inherently subjective nature of the interpretation of patent claims and the application of the doctrine of

equivalents in the context of infringement.<sup>195</sup> However, the courts have found instances of literal and equivalent infringement in the field of biotechnology and have attempted to define the scope of proprietary protection on a case-by-case basis.

## Enablement and Deposits

In the 1970s, the Federal Circuit Court endorsed the practice of depositing samples to fulfil the enablement requirements of the Utility Patent Act. In fact, unlike many other countries, the American federal appeal court determined that deposits with accredited depositories were unnecessary until the date of issuance of the patent. 196 In most other jurisdictions, deposits must be made at the time of application and failure to make a timely deposit can result in a denial of the grant on the basis of insufficient disclosure. 197 Currently, the Code of Federal Regulations does not require the deposit of biological material unless it is essential to meet the enablement requirements of the Utility Patent Act. Further, these regulations expressly refute any general presumption in favour of such deposits. 198 However, uncertainty exists as to whether the requirement of disclosure of the "best mode" in Section 112 of the Utility Patent Act effectively dictates that a deposit be made of the product itself. 199 There is no general rule in this area, and in the past this issue has been resolved on a case-by-case basis in accordance with the regulations.<sup>200</sup>

### Legislative Amendments

There has been a strong effort to amend the Utility Patent Act to clarify and adapt the general patent rules to suit biotechnological inventions. A bill is currently before the Congress that would overrule *In Re Durden* and ease the usual threshold level of inventiveness in relation to biotechnological process patents. <sup>201</sup> It provides that novelty and unobviousness of either a starting or end product will import an adequate degree of novelty and unobviousness to the related process, thereby creating a "unity of invention" concept for process patents similar to the standards adopted by the Japanese and European patent offices. <sup>202</sup> Proponents of these changes claim that statutory amendments to increase both the ambit and the certainty of patent protection are vital due to the huge capital expenditures necessary to develop inventions in the biotechnological field. <sup>203</sup>

The Utility Patent Act was amended in 1988 to include a provision eliminating a deficiency in the law of infringement whereby it was possible for a foreign entity to use a patented process in a foreign jurisdiction to create a similar or dependent product and then proceed to import that product and offer it for sale in the United States without sanction. This problem was brought to public attention in the case of *Amgen v. Chugai*, <sup>204</sup> which involved a battle between two biotechnological firms over rights regarding a commercially lucrative human protein that prevents blood clotting. The American firm patented the starting materials and processes needed to produce the protein using recombinant techniques. The Japanese firm was the exclusive licensee of the purified form of the protein.

Under American trade laws in place at the time, Chugai was able to use the starting materials patented by Amgen and import large quantities of the end product — recombinant protein — into the American market at a greatly reduced price without infringing Amgen's patent. The Process Patents Amendments Act of 1988<sup>205</sup> eliminated this deficiency by increasing the statutory definition of infringement to include importing an end product made using a previously patented process.

## Methods of Medical Treatment

In the United States, there is no legislation dealing specifically with intellectual property rights in methods of medical treatment involving new reproductive technologies. The patentability of methods of treatment is not expressly excluded under the provisions of the Utility Patent Act. While some uncertainty has existed in the past, it now appears settled that methods of treatment are potentially patentable subject matters. There are precedents involving the patenting of medical processes. The advisability of issuing patents over medical treatments in new reproductive technologies was brought into question in 1984 when a private company applied for a grant of patent encompassing both the instruments necessary to perform surrogate embryo transfers and the process itself.

Academic views on this subject are divided. Some argue medical process patents should not be allowed, to ensure that physicians avoid conflicts of interest; processes are fully and independently evaluated and are freely available; and, in the area of human reproduction, unbearable intrusions into the personal affairs of the patients involved are avoided.<sup>207</sup> Others suggest that the good provided to society in general justifies the issuance of such proprietary rights and that compulsory licensing can eliminate most of the concerns voiced by those who oppose these proprietary rights.<sup>208</sup> In recent years patents have issued over medical processes specifically related to the new reproductive technologies.<sup>209</sup> In the United States, as in most other jurisdictions, the instruments and machines used in such methods are capable of patent protection.

# Substantive Regulation of New Reproductive Technology

Numerous federal and state regulations exist relating to the uses that can be made of human tissue generally and fetal tissue specifically. These regulations have a great impact on the feasibility of innovation in this area and consequently shape the necessity and scope of proprietary protection.

Two federal statutes impact on the use of fetal remains by permitting the parents of a stillborn infant or a deceased fetus to donate it for research or therapeutic purposes, but prohibiting the sale of the remains for transplantation if the transaction affects interstate commerce. These acts are poorly worded and appear (perhaps unintentionally) to ban commerce involving the subparts, arguably including cell lines, of all enumerated organs. In the subparts of the subparts

Federal regulations also govern the protection of human research subjects including living in utero and ex utero fetuses involved in federally The regulation of federally funded activities "involving the dead fetus, macerated fetal material, or cells, tissue, or organs excised from a dead fetus shall be conducted only in accordance with any applicable State or local laws regarding such activities." The regulation of fetal remains varies greatly between states; for example, experimentation is criminalized in certain states, while it is completely unregulated by statute in others. Experimentation involving human fetuses is also regulated by several federal agencies, most notably the National Institutes of Health.

Perhaps one of the most serious setbacks to these experiments occurred in the spring of 1988 when a moratorium was announced on federally funded experiments involving the transplantation into human recipients of fetal tissues obtained through elective abortions. The moratorium has been indefinitely extended. While this moratorium does not cover all experimentation involving fetal tissue, it has had a chilling effect on privately funded research and consequently a significant effect on the progress of science in this controversial area. There has been a strong movement to lift this ban; a bill removing the moratorium has passed through Congress and is set for a vote before the Senate in the near future. Although this bill ends the moratorium on funding, it contains certain disclosure requirements that may practically discourage donations of aborted fetal tissue for research purposes.

In summary, the United States has recognized the huge economic potential of advances in biotechnology and appears to endorse the view that its prominence in the international marketplace requires a strong intellectual property regime. The American judiciary has been somewhat inconsistent, but generally has adhered to the strict traditional principles of the patent regime. The government has responded to some problems, demonstrating a strong nationalistic desire to remain at the forefront of the area. However, to date it has not gone so far as to create a new intellectual property law regime or indeed to significantly alter the existing principles of the utility patent system to provide increased protection to innovations in the biotechnology area. The government has also demonstrated a reluctance to use federal funding for inventions that specifically involve aborted fetal tissue, evidencing an attitude that undoubtedly will have a negative impact on the rate of advancement in new reproductive technologies.

# Europe<sup>219</sup>

Patent protection relating to the new reproductive technologies in the European Economic Community (EEC) is governed by the domestic laws of each member state and a number of international treaties. The most relevant of these treaties is the European Patent Convention (EPC). 221

#### The EPC

According to Article 52(1) of the EPC, "European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step." Article 53 of the EPC expressly prohibits the granting of patents in respect of:

plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.<sup>222</sup>

The domestic enactments of most member states are similar but not equivalent to this provision, <sup>223</sup> and most member states have also enacted plant variety protection regimes pursuant to the UPOV, partially filling the intellectual property law void created by this exclusion. <sup>224</sup>

The exclusion of plant and animal varieties under the EPC and their subsequent inclusion in conventional breeders' rights regimes were apparently based on the state of the art at the time the EPC was drafted. It is yet another unfortunate result of the fact that the patent regime was ill suited (in the prevailing view of experts) to provide protection to plant and animal varieties and biological inventions. However, with the advances in the biotechnological area in the last 20 years, opinions in this area are changing. Additionally, the practical effect of these provisions is being minimized by two forces: first, authorities in the Technical Appeals Office are placing a very restrictive interpretation upon the exclusion in Article 53; second, the EEC is currently considering proposals that would afford biotechnology greater protection in the patent system in the future (see Appendix 1). However, with the advances in the EEC is currently considering proposals that would afford biotechnology greater protection in the patent system in the future (see Appendix 1).

# Administrative Response

The Technical Board of Appeal of the European Patent Office, illustrating a tendency to increase the allowable scope of patentable subject matter, <sup>227</sup> has taken a very narrow view of the plant and animal variety exception. Patents have issued over generic plant and animal subject matters that are not directed to a particular *variety*, as that term is used in plant breeders' regimes. This restrictive approach was well illustrated in the decision of the board in the application for a European patent over the Oncomouse. <sup>228</sup>

Claims to the process used to produce the Oncomouse and the resulting animal were rejected at first instance by the Examining Division of the European Patent Office. The Examining Division held that Article 53(b) excluded the issuance of patents over animals in general and that the processes used to produce animals did not fall within the patentable

category of microbiological processes. The Technical Appeal Board reversed this ruling.230 According to the board, exceptions to the general rule of patentability must be restrictively interpreted; therefore, the restriction on animal varieties should not apply to animals per se. Furthermore, microbiological processes represented an exception to the exception and, as such, restored the patentability of processes even if they related to the production of animals or were essentially biological. The board held that the process by which the desired genes were inserted into the animals was not "essentially biological," and accordingly neither the process claims nor the product-by-process claims were excluded by Article 53(b). The board ultimately remitted the decision back to the Examining Division to determine whether genetic manipulation of animals should be banned by Article 53(a), which prohibits the publication or exploitation of inventions contrary to the public order or morality. 231 In the fall of 1991, the European Patent Office followed the United States and allowed a patent to be issued for the Oncomouse. 232

## Legislative Response

The EEC has recognized the importance of biotechnology generally and has attempted to preserve its international competitiveness through the creation of programs designed to increase the level of research and development throughout Europe.  $^{233}$ 

The EEC has also recognized the importance of intellectual property as a key to the maintenance of global competitiveness. In October 1988 the Council of the European Communities submitted a proposal for a council directive regarding the legal protection of biotechnological inventions.<sup>234</sup> The proposal recognized the fundamental importance of this industry and the need to create a uniform European system to compete with the protection offered in the United States and Japan. Accordingly, the proposal created a number of unique provisions designed to standardize, increase, and clarify the scope of patent protection available in all member states for biotechnological inventions. The proposal contains specific provisions relating to the scope of patentable subject matter, the scope of patentable rights in biotechnology, disclosure and deposit requirements, and the interface between patent rights and plant breeders' rights.<sup>235</sup>

The proposed directive expressly states that living matter is a potentially patentable subject matter.<sup>236</sup> The proposal expands the scope of patent protection by providing that any invention potentially unprotected by the plant breeders' regimes may fall within the purview of the patent regime.<sup>237</sup> For example, any process involving a micro-organism in any single step will be considered a microbiological process and therefore potentially patentable. Further, uses of plant and animal varieties and processes for their production will also have the potential to receive patent protection.<sup>238</sup> In addition, the proposal expands the ambit of patentable subject matter by providing that any process involving more than the

selection of biological material and permitting it to perform its usual biological functions is potentially patentable.<sup>239</sup>

The actual scope of patent protection is also increased by provisions that recognize the self-replicating feature of biotechnological inventions. According to these provisions, the use of a patented product or process to create progeny for commercial purposes will be considered an act of infringement. The proposal sets out detailed requirements for deposits. These requirements will effectively increase the existing level of proprietary protection by restricting public access to samples and reversing certain evidentiary burdens in infringement cases in the event a deposit has been released to any third party. The protection is also increased by provisions that recognize the self-replication is also increased by provisions that recognize the self-replication is also increased by provisions that recognize the self-replication is also increased by provisions that recognize the self-replication is also increased by provisions that recognize the self-replication is also increased by provisions that recognize the self-replication is also increased by provisions.

Under the proposed directive, the scope of patent protection is narrowed by the recognition of dependency licences for plant breeders. The proposal acknowledges the continued existence of breeders' rights in relation to plant and animal varieties<sup>242</sup> and provides compulsory licensing of patents for the benefit of plant breeders in certain circumstances.<sup>243</sup>

## **Medical Treatment**

Article 52(4) of the EPC specifies the following:

Methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body shall not be regarded as inventions which are susceptible of industrial application within the meaning of paragraph 1. This provision shall not apply to products, in particular substances or compositions, for use in any of these methods.

Article 18 of the proposed directive regarding the protection of biotechnological inventions expressly narrows this exclusion and continues the prohibition on patenting of surgical or diagnostic methods of treatment only in the event that those methods of treatment are to be used for therapeutic purposes.

# Substantive Regulation of Experimentation

The EEC is also attempting to reconcile state regulations pertaining to the experimental use of fetuses and embryos, which may prove a difficult, if not impossible, task given the divergent domestic enactments. For example, the United Kingdom has enacted the Human Fertilisation and Embryology Act 1990, the sets up a complex licensing procedure for new reproductive technologies and outlines the conditions under which human fetuses and embryos may be used for experimental purposes. Germany, on the other hand, has introduced legislation for the protection of fetuses and embryos that has been described as Draconian. It places very strict controls on new reproductive technologies, criminalizes certain activities, and bans all research on any living embryo that could cause injury to that embryo.

## Australia<sup>247</sup>

Australia's patent system is governed by the Federal Commonwealth Patents Act, <sup>248</sup> which permits the patenting of inventions subject to the usual utility, novelty, and inventiveness criteria. <sup>249</sup> The Patents Act provides that "human beings, and the biological processes for their generation, are not patentable inventions." The predecessor of the current Patents Act specifically banned the issuance of patents for substances capable of being used as food or medicine, and consisting only of mixtures of known ingredients, and the processes for producing them. <sup>251</sup> This prohibition is not included in the 1990 version of the Patents Act.

During the 1970s, the assistant commissioner of patents ruled that animate matter, and particularly micro-organisms per se, were potentially patentable subject matters. The Australian Patent, Trade Marks and Designs offices announced in 1980 that no distinctions would be made in determinations of patentability on the basis that the proposed subject matter was a living entity. All animate and inanimate subject matters would be required to meet the same prerequisites of utility, novelty, and unobviousness. The announcement stated that, since the law required disclosure sufficient to permit reproduction of the same living organism, the statutory disclosure requirements could be of special concern in this area. The same is a special concern in the same area.

The Patents Act currently provides that if deposits are made in accordance with certain enunciated provisions, then the disclosure requirements in relation to any claim involving a micro-organism will be satisfied;<sup>255</sup> the statute does not mention any other life forms. Australia is a signatory to the Budapest Treaty, and accordingly the Patents Act includes provisions to facilitate international sample deposits. In Australia, microbiological products and processes, including cell lines, are also considered patentable subject matter.<sup>256</sup>

The Patents Act does not expressly deal with the patentability of medical treatments. However, under the terms of this statute, the issue of patentability is determined in accordance with the Statute of Monopolies. Accordingly, judicial precedent has held that methods of treatment of human beings specifically related to the treatment or prevention of disease, malfunction, disability, or incapacity are not patentable subject matters. 258

Australia has been a world leader in certain areas of new reproductive technologies, particularly in the area of infertility treatment. Accordingly, the issue of fetal and embryonic use has been extensively considered by numerous state and national government agencies within Australia with varying results. To date, the country has not been able to adopt a single, uniform approach. Some states have concluded that legislation is an inappropriate method of regulating this field, while other states have enacted detailed regulatory and prohibitory schemes.<sup>259</sup> Once again, as patents confer only exclusionary rights, the regulation in this area has

affected the ability of inventors to create subject matters capable of commercial protection.

It would appear that in Australia, with the exception of human embryos themselves and methods of treatment of disease, incapacity, or malfunction, the products and processes within the new reproductive technologies field are potentially patentable subject matters.

# Part 5 — Policy

## Introduction

This portion of the report deals with the policy issues and some ethical issues involved in the recognition of commercial, proprietary interests in the products and processes involved in new reproductive technologies. Commercial ownership of fetuses and embryos in their entirety, fetal and embryonic tissues, derivative products, genetic information, and medical treatments and other processes related to new reproductive technologies are considered. This section is divided into four main areas: the desirability of recognizing proprietary rights, the necessity of recognizing such rights, the appropriate level of protection, and the practical issues involved in implementing an appropriate system.

# **Desirability of Protection**

The purpose of this paper is not to determine the ethics of new reproductive technology per se. Moreover, it is premised on the assumption that property rights do exist in relation to these products and processes. It must also be recognized that intellectual property law is not the most appropriate forum in which to explore these ethical issues. However, certain basic ethical concerns involved in recognizing any proprietary interests in advances in this science must be addressed.

Ethics cannot be avoided for two reasons. First, governments themselves have become increasingly involved in commercialization of the results of research performed by their own agencies and by independent industries supported by public funds. Second, the existence and level of proprietary protection afforded to advances in the new reproductive technologies are among a number of key factors that determine whether or not such activities will be pursued by the private sector. Other key factors that determine the viability of a base level of scientific research and development include the existing regulatory framework (which applies before the development process through licensing and funding arrangements, throughout this process, and after the development of a particular product or process through premarket approval procedures), criminal prohibitions, and tax treatments.

The existence of a proprietary paradigm will have a significant impact on the willingness of private industry to invest the levels of capital required to develop any advances in new reproductive technologies to the point where they can be brought to the marketplace for public use. Most patent regimes recognize ethics as a primary limiting factor by prohibiting the issuance of rights in respect of inventions that would have immoral or illegal effects if commercialized. The overall desirability of providing a proprietary regime to regulate ownership of scientific advances involves a comparative analysis of the benefits and detriments inherent in the implementation of any proprietary system.

Several relevant ethical considerations are common to all types of advances in the new reproductive technologies. General factors militating against the implementation of a proprietary regime include the devaluation of human life, particularly the potential for life embodied in the fetus or embryo. Other objections have also been raised, such as the possibilities of the subrogation of women as a source of supply of raw materials; potential conflicts of interest that arise for physicians involved in the recovery of rare and useful aborted tissues or spare embryos; <sup>264</sup> environmental hazards; potential for misuse of the technology; the development of an unacceptable limitation on the concept of *genetic therapy*; <sup>265</sup> the loss of genetic diversity and heritage; the compromise of science for profit; <sup>266</sup> the creation of barriers to the free flow of information; and the potential for economic abuses inherent in any grant of market monopoly. The last factor is of special concern given the expected inelastic nature of demand for many of the innovations in this area.

Common factors proposed by some as favouring the implementation and strengthening of proprietary rights in relation to advances involving new reproductive technologies include the potential to enhance the viability of human life on the earth, and to solve problems of disease, starvation, and over-population. Although there are many common ethical considerations involved in this field, there are also considerations that are unique or of special concern in relation to the particular categories of advances in the new reproductive technologies; therefore, it is useful to consider these categories separately.

#### **Products**

Human Fetuses and Embryos

Intellectual property rights have not been historically recognized in relation to human fetuses and embryos. Ethical considerations, such as general respect for human dignity and abhorrence of any recognition of property interests of one human being over another, suggest that human embryos and fetuses are not appropriate subject matters for any intellectual property law regime. Ethical restraints, therefore, enacted through regulatory regimes, often ban the types of experiments most likely to result in the creation of a patentable advance involving human or partially human higher life form subject matters. As noted earlier, in the United States

the issuance of patents over human beings is prohibited on the basis that the inclusion of human beings in a proprietary regime would be tantamount to an unconstitutional endorsement of the subrogation and enslavement of human beings.  $^{\rm 269}$ 

Tissues Derived from Human Fetuses and Embryos

Tissues and cell lines derived from fetuses and embryos are protected under existing patent regimes despite the fact that they may give rise to many of the same concerns involved in the recognition of property rights in complete human beings.<sup>270</sup>

The issue of abortion is raised with regard to products derived specifically from fetuses and embryos. Those who oppose the use of these tissues espouse the view that commercialization of these products will inevitably lead to increased demand for healthy tissue, which can be obtained only through elective abortion procedures or through the use of "spare embryos" created during the process of *in vitro* fertilization. This potentially increased demand is perceived to create the potential for abuses involving commercialization of abortion itself, jeopardizing the lives of women, subrogating women with reproductive capacity, and public endorsement of the deliberate sacrifice of human life for financial or personal gain. Those opposed to the provision of commercial protection over these tissues also claim that limited supplies will create unacceptable conflicts of interest for the doctors involved in obtaining "waste tissues" through abortion or other artificial techniques.

Advocates of the use of these tissues suggest that the government can, through statutory enactments or the creation of administrative mechanisms, build safeguards into the supply of fetal and embryonic tissues, thereby eliminating any offensive link to abortion for commercial purposes or personal gain, and concurrently minimizing situations giving rise to professional conflicts of interest. Proponents of the use of fetal and embryonic tissues further contend that as these tissues comprise "waste materials," it is unethical to ignore their enormous potential to benefit society as a whole. Some feel that the patent system is an essential element of the overall incentive that ensures that ethical and necessary research will be performed on cell lines and products. Further, the creation of an environment that encourages commercial inventiveness in this area will ultimately lead to breakthroughs that drastically reduce or even eliminate the need for fetal and embryonic tissue and, consequently, any ongoing moral dilemma. 272 This final argument has a double edge because advances in contraception and in vitro techniques may also drastically reduce or eliminate the current sources of supply of "waste tissues" essential for the creation of primary cultures.

# Genes and Genetic Sequences

Genes were routinely patented once their function had been determined and isolated. However, due to the state of the technology, this process was slow and relatively infrequent, and such a vast percentage of

the human genome in particular remained unknown that the implications of large-scale proprietary interests and control were not given serious consideration. The ethical debate regarding the patenting of genetic processes centred on the same concerns that arise with respect to tissues and other derivative products in general, and the spectre of eugenics in particular. However, in 1991 the National Institutes of Health (NIH) filed patent applications covering a substantial amount of human genetic materials representing approximately 5 percent of the total human genome. This move by the NIH prompted impassioned debate and congressional hearings regarding the limits and purposes of the patenting system and the ethics of proprietary ownership of generic human genetic material. The main thrust of the ethical concerns currently raised in this area is that this genetic material is part of the common heritage of humanity, which, in principle, should be freely available to all.

## Processes

## Processes in General

The ethical issues raised by the possibility of providing proprietary rights in processes involved in new reproductive technologies mirror those generated when one considers the advisability of recognizing proprietary interests in the starting materials or end products involved in the processes.

# Processes Involving Medical Treatment

Special considerations arise with respect to processes that can be characterized as involving medical treatments. As noted earlier, these processes were originally exempted from proprietary protection on the basis that they were considered incapable of any form of industrial purpose. Subsequently, judicial and legislative opinions have generally followed established precedents and endorsed their exemption on general and, at times, somewhat vague policy grounds based on a desire to minimize commercialization of medical treatments. The rationale for exclusion seems questionable, given that grants of patents have routinely issued over the tools and machines necessary to perform medical treatments. The ethical opposition to the patenting of medical treatments is based on the general desire to avoid situations that create unacceptable conflicts of interest for physicians; the need for unimpeded access to medical treatments; and the desire to ensure robust, impartial, and independent evaluation of novel medical treatments, which, unlike medical products, are not subjected to an independent regulatory system to ensure their safety and efficacy prior to being made publicly available. Concern is also voiced that proprietary disputes could result in overly intrusive inquiries into the personal affairs of patients.<sup>275</sup> The American Fertility Society guidelines on reproductive technologies consider patenting medical procedures involved in infertility treatments to be unethical; however, the guidelines do endorse patenting products associated with these techniques. 276

Ethical aspects and implications must be addressed in the evaluation of the appropriateness of the application of any intellectual property paradigm to technological advances. However, the focus of this report is directed toward the necessity of and appropriate level of protection for *ethically acceptable* research and development activities.

# **Advantages of Proprietary Protection**

Once it has been determined that the activities involved in the development of new reproductive technologies are themselves ethical and desirable, then consideration must be given to the most appropriate method of ensuring the continuation of these activities. This part explores how recognizing intellectual property acts as an incentive to fulfil the demand for advancements in the new reproductive technologies. This topic can be divided into two related subparts: the appropriate control mechanism and the effect of current international trends.

# Appropriate Control Mechanism

Any mechanism to ensure that ethical advances in new reproductive technologies are brought to the public must meet a number of objectives. The system should create an ethically acceptable balance between the rights of innovators, as opposed to competitors, and the paramount interests of society as a whole.

It must be flexible enough to accommodate the extremely diverse range of products, processes, and research objectives involved in this area. A mechanism that ensures advances are made in treatments of infertility (which has a rather limited commercial application due to a relatively low level of demand) may be entirely inappropriate to provide an incentive for the development of treatments for diseases that may have a potentially huge, inelastic, commercial demand. Similarly, the system must recognize that not all markets are commercially equivalent. To use the cure for acquired immunodeficiency syndrome (AIDS) as an example: while there is an urgent global need for such a cure, only certain markets can afford to reimburse innovators for the development costs associated with it.<sup>277</sup>

The system must also accommodate the fact that different types of research are involved in the development process and that paradigms for the provision of intellectual property rights will affect the balance between, and composition of, these different types of research.<sup>278</sup> In theory, the research performed in public agencies such as universities traditionally has been based on academic freedom and has consisted of basic research, which, although it possesses no immediate commercial motive or value, may ultimately form the foundation for applied commercial research. Applied commercial research has been performed by private entities that have ultimately brought the results of the basic and applied research to market. However, this division of research is becoming increasingly

dynamic as both public and private institutions become more attuned to economic considerations and more involved with one another.<sup>279</sup>

The mechanism to ensure the advancement of useful sciences in the name of society as a whole must be able to accommodate all these differences and innumerable other situational variations, such as the fact that a non-commercial research project may, by chance or by design, yield very lucrative information. For example, if the government funds basic research into infertility that results in the discovery of an improved long-term reversible method of contraception, how should that information be controlled? Who should use that information? How should the final product be brought to the marketplace?

The research and development activities involved in the field of new reproductive technologies require large capital investments to produce advances, which, if successful, may or may not result in the creation of commercially lucrative products. Practically, there are only two entities that can make the necessary capital investments — society as a whole (through government) and private industry. Therefore, the first decision to be made is whether the government should assume the economic responsibility for innovation or whether it is better left to private industry.

## Public Investment

The guiding principle regarding investment in innovation and risk capital has been to characterize the activity as a private sector responsibility — innovations should be left to private entities in the absence of practical difficulties or extraordinary policy considerations that mandate government involvement beyond a supervisory or regulatory role. However, if there are any unique considerations involved in the area of new reproductive technologies suggesting that private ownership would be inappropriate or impractical, then public control could be used to ensure that the research and development process is carried through to fruition. That is, if a particular area of investigation is beneficial, but has no commercial application, then private industry may have no incentive to invest the requisite capital (in such a case, the existence of a system of market exclusivity is irrelevant); but if society as a whole endorses and requires the advance embodied in a product or process, then the costs of research and development must be borne by society as a whole.

The potential for commercial gain will not always be the determinative issue. For example, for nuclear technology and nuclear weapons in particular, intellectual property paradigms such as patent and trade secrets could provide the impetus for research and development capital. However, other policy concerns such as national security and public safety dictate that this activity be controlled by the government itself, and that secrecy be maintained independently of any proprietary system.

The inelastic nature of demand for a particular product or process may also be a factor militating against leaving it in the private sector. However, price insensitivity may be more efficiently controlled though other measures

such as licensing and royalty arrangements rather than a pure patent system or total government control.

## Private Investment

If the responsibility to invest capital in advances in new reproductive technologies is to be borne by private investors, then some economic incentive must exist or else the required funds will be invested in other areas that provide returns commensurate with the risk levels involved. 280 The appropriate incentives may exist independently of the creation of any proprietary regime in the marketplace itself. However, as all industrialized nations have used intellectual property law regimes (trade secret and patent regimes in particular) to create this private incentive, it is difficult to envision an alternative mechanism or to perform any meaningful comparative analysis.<sup>281</sup> Canadian intellectual property paradigms have been reviewed and questioned on a number of occasions, resulting in substantial adjustments, but never abolition.<sup>282</sup> In the pharmaceutical area, it has recently been determined that some form of proprietary protection is required to secure the development of new pharmaceutical products in Canada.<sup>283</sup> In 1991 the National Biotechnology Advisory Committee identified patent protection as an essential element to ensure that research and development in the area of biotechnology continues to occur in Canada.284

When considering the necessity of intellectual property protection for inventions in the field of new reproductive technologies, a lesson should be learned from the experience gained from the development of a unique system of protection for integrated circuit topographies. Detailed consultation with representatives from industry is essential to determine, first, the necessity of any form of proprietary protection, and second, the appropriate form of protection. Industry itself may have created adequate barriers to competition that render monopolistic rights or secrecy superfluous or unwarranted. Any decision regarding the provision of property rights must take account of not only the current state of the particular industry under consideration, but also where the industry is headed and the effects of anticipating legislative changes.

# Effect of Current International Trends

The role of a scheme of proprietary protection for advances in new reproductive technologies is also influenced by a number of international factors. Many countries, including Canada, have recognized the importance of the biotechnological industry in achieving global competitiveness. Consequently, a strong domestic economy and certain intellectual property rights are essential elements in the fostering of an environment conducive to this development. As a participant in international trade and in the efforts to standardize intellectual property regimes and trade laws to create a fair global system, Canada cannot afford to ignore the current trend to harmonize and strengthen existing levels of intellectual property protection. If decisions were made in an international vacuum, Canada would

risk experiencing a large-scale exodus of intellectual and financial resources, resulting in the stifling of domestic innovation. The nation could eventually become overly dependent on other countries — a mere licensee or importer of the products developed and priced elsewhere. If policy decisions regarding intellectual property ignore existing trade channels and international agreements such as the General Agreement on Tariffs and Trade (GATT) and free trade, Canada could ultimately end up with little or no control over the very policy issues it is trying to balance through the crafting of domestic intellectual property rights that swim against the present international tide. <sup>288</sup>

# The Appropriate Level of Protection

Once it has been determined that some form of proprietary protection is essential to guarantee that a desired activity will occur, then the focus must turn to designing an appropriate system. Again it must be emphasized that empirical data and industrial input relating to market conditions are imperative in crafting a suitable system. In the absence of this information, little more than general conclusions can be drawn.

The review of the existing range of intellectual property regimes and the international experience contained in parts 3 and 4 of this report illustrates that a patent or quasi-patent regime represents the most suitable option. The very purpose of patent and quasi-patent paradigms is to formulate a system that optimizes the balance between the interests of the innovator and the interests of the public at large. The innovator desires the largest return possible and wishes to have the barriers to commercial competition maximized through exclusive control and minimal disclosure. The public interest favours the advancement of society in general through the dissemination of information and promotion of the useful sciences, the efficient use of scarce resources, and the minimization of the potential for market abuse inherent in monopolistic market control. We may recall that in certain areas, such as medical products, the potential for abuse may be exacerbated due to the non-elastic nature of market demand.

The creation of an optimal balance involves consideration of the two basic elements of all intellectual property regimes that determine scope of protection: the definition of the subject matter over which property rights will be granted and the limitations of those individual property rights.

# Subject Matter

In defining the scope of matters falling within the protective scheme, one must consider the nature of research in the new reproductive technologies. Research and development can be loosely divided into profit-driven applied research and non-profit-driven basic research. The nature of patentable subject matter affects the investment of resources and consequently shapes the character of research and the delineation between basic and applied areas.<sup>290</sup> The limitations on subject matter must be

crafted so as to promote between these two essential types of research an acceptable balance that does not stifle progress by premature commercialization or over-zealous disclosure. Further, as it is evident that not all advances in new reproductive technologies should be protected, the system must distinguish between protectable and non-protectable innovations. The threshold criteria of utility, novelty, unobviousness, and enablement represent the starting point in the creation of a model to limit the granting of exclusionary rights in a manner consistent with the advancement of all the competing goals of the system.

## Utility

The utility criterion ensures that only advances that can actually be put to some known tangible use are protected. The purpose of this requirement is to limit property rights to inventions that possess some physical embodiment and actually perform a useful function. It prevents the commercialized control of raw ideas or products and processes that have not been developed to a level beyond mere experimental purposes. It also provides the mechanism to control the scope of exclusivity between related inventions, in that novel uses of existing inventions can also be patented. 291 In this way, the utility requirement bridges the gap between basic and applied research by precluding premature commercialization of ideas. theories, and insufficiently developed subject matters. By rewarding only those efforts that produce a tangible benefit to society, the utility criterion ensures that the patent system does not become a chance lottery. In the area of new reproductive technologies, this factor would prevent the patenting of fetuses and embryos and derivative products for purely research purposes.

# Novelty

The novelty criterion ensures that exclusive rights are not created over subject matters that were previously freely available. This limiting factor has been modified to permit property rights in relation to natural products that have been isolated or modified by human intervention to such an extent that they are significantly different from their natural form. This relaxation may be inappropriate in the new reproductive technologies, but historically it has been deemed necessary to encourage exploration and exploitation of the useful characteristics of the products found in nature. The novelty standard would prevent the patenting of fetuses, but not necessarily the patenting of embryos created through artificial procedures. <sup>292</sup> Isolated and purified embryonic and fetal tissues, cell lines, and proteins would not be excluded by this limiting criterion.

## Unobviousness

Unobviousness limits grants of proprietary interests to advances that would not be obvious to those skilled in the area at the time of invention. This criterion separates advances that constitute either basic enabling research or insignificant alterations of existing inventions from those that

involve true inventive ingenuity. Inventive ingenuity is not synonymous with commercial value. Within any technology, it is a dynamic and often cyclical concept. It generally begins with an advance that can be characterized as a "quantum leap" and proceeds in progressively smaller increments involving variable levels of commercial and social value until the technology reaches the point of saturation after which the advances are not considered worthy of protection. The cycle then repeats itself through another "quantum leap," when a totally new technology is discovered or a previously unknown wrinkle in an existing technology is revealed. The criterion of unobviousness must be flexible enough to accommodate these cycles and to define with reasonable certainty the minimal increment of advance that must be satisfied for the provision of proprietary interest.

The field of biotechnology appears to be in the middle of a cycle in which advances are becoming smaller and smaller. This may explain the push in the United States to relax the threshold level of obviousness. The advisability of any relaxation must be based on the decision that defined advances outside the usual standard are worthy of commercial protection; in other words, commercial protection must be required to advance the interests of society as a whole. The threshold criterion must not be lowered to the extent that the basic theories underlying the patent system are compromised. Unwarranted relaxation of this criterion can render patent protection meaningless; if variation of an existing invention can be patented every minute, the field of advancement will be crowded to the point that patent protection becomes worthless for all practical purposes.

# Patenting and the Human Genome Project

The highly publicized debate caused by current attempts to patent certain research results in the international human genome project is helpful in illustrating the effects of limiting subject matters capable of protection through threshold criteria such as novelty, utility, and unobviousness.<sup>293</sup>

The human genome project began in the late 1980s. It is an ongoing, internationally coordinated effort to map and sequence the entire human genome, to gather information regarding the structure of human genetic materials, and to computerize the results in freely accessible databanks. <sup>294</sup> It is hoped that some of this information will ultimately form part of the foundation for advances in methods to identify and treat diseases. The massive size and cost of this undertaking make the rapid and free flow of information essential to ensure its completion, as well as the efficient use of resources and the elimination of any needless duplication of effort. <sup>295</sup> Issues of ownership regarding the resulting data arose almost from the project's inception due to the subject matter (the common human genetic heritage) and the varied financial contributions of the participating nations. <sup>296</sup>

These issues were brought to the forefront in 1991 when the NIH applied for patent rights over genetic materials amounting to approximately

5 percent of the entire human genome. Researchers at the NIH have been deeply involved in the project and have developed a method for producing DNA sequences at a greatly increased rate, which they expect will reduce by several years the time required to map the genome. A similar project was also under way in the United Kingdom at the Medical Research Council (MRC). The process does not reveal any information regarding the function of the sequences, merely that they exist. Officials with the NIH have stated that the patent application was filed to preserve any potential national economic benefits and to ensure the free flow and use of this information<sup>297</sup> (an ironic twist to the exclusivity concept of the patent system).

Aside from the previously mentioned ethical concerns regarding ownership per se, many legal questions arise that illustrate the policy reasons behind the limiting criteria of utility, novelty, and unobviousness.

The importance of utility as a limiting factor can readily be seen in the human genome project. Prior to the NIH application, patents issued over genetic sequences only when the patentee possessed at least a general understanding of the function of the particular gene. However, the utility requirement has been relaxed over time. Today, the patentee is not compelled to have a specific predetermined utility; however, he or she must have expended efforts to determine the suitability of the sequence for a particular purpose over and above further research. NIH inventors appear to be requesting an even lower threshold measure of utility. They are claiming proprietary rights over the genetic material even though they have no understanding of the specific function of the genes, beyond broad and generic purposes common to many gene fragments.<sup>298</sup> Critics of the NIH application maintain that to allow patents lacking in utility transforms the patent system into a lottery based on unsubstantial patents, which prematurely rewards patentees on the basis of luck rather than effort.<sup>299</sup>

The significance of the novelty criterion is also demonstrated in this situation. Those who object to the patent claim that the sequences represent merely a description of raw information regarding nature, and therefore to patent them removes information (that was previously free and that accordingly should remain free) from the public domain. The difficulty with this position is that, while the information was within the public domain, it could be understood or harnessed only through the expenditure of considerable time and effort. Therefore, the real question to be addressed by the novelty criterion is whether the expenditure justifies removal of the subject matter from the public domain.

The NIH patent bid also illustrates the relevance of unobviousness as a limiting criterion. Despite the subjective and amorphous nature of unobviousness, it is an essential element of property regime, as it distinguishes advances that are worthy of protection from those that are unwarranted and insubstantial. However, the diversity of views on the NIH patent bid illustrates that universal agreement on the practical application of this limiting factor is far from being reached.

The repercussions of the NIH patent application are ongoing, and it is too soon to be able to assess exactly what the ultimate effects will be. 301 Some allege that the introduction of intellectual property rights at this stage may jeopardize the entire project. Two developments subsequent to the patent application show the effect of commercialization at the basic research level. First, in response to the NIH application, the MRC contemplated applying for proprietary rights over the data it had created, decided that once its data base was running it would charge commercial users a users' fee, and refused to disclose information that could jeopardize its contribution to the project. 302 Second, an American-based private firm has recently attempted to commercialize the sequencing process, raising some fears that, in the future, control over human genes could rapidly be dominated by private industry. 303

The NIH bid illustrates that if the threshold criteria are compromised there is a real danger it could ultimately stifle technology. Patenting basic research could lead to attempts to obtain unwarranted dominant positions over entire fields of science through monopolistic control of raw materials and information that have not been developed to the point of practical application, consequently subverting the basic purposes of the patent system.

## Enablement

The enablement criterion practically limits grants of patents to those inventions that can be disclosed in a manner that guarantees a return to society. Enabling disclosure increases the pool of useful knowledge and may lay the foundation for further innovations in the useful sciences. It defines the boundaries of the patent monopoly and guarantees that the invention will be available both during the period of exclusivity for research purposes and afterwards for any purpose. Full and enabling disclosure must be retained and coordinated with the registration system to ensure that the proprietary regime meets public interest objectives.

# Substance and Limitations of Property Rights

Proprietary rights over protected subject matters should not be absolute. They must merely be adequate to attract the requisite level of investment. Exclusive market rights can be limited by a number of factors including temporal restrictions, compulsory licences, the definition of acts constituting infringement, recognition of exceptions to infringement, and exhaustion.

# Temporal Limits

The terms of monopolistic rights in intellectual property paradigms range from five years, under the industrial design regime, to an indefinite period under the trademark regime. The international standard period of exclusivity for patents is 20 years and probably marks a basic starting point, which should be deviated from only if sound policy reasons dictate a variation. The proper term should reflect factors such as the actual cost

of investment in research and development, the market life of the product, and the regulatory barriers that delay the process of commercial exploitation. Through the mechanism of compulsory licensing, the term can also be divided into distinct periods involving different rights.

## Compulsory Licensing

The introduction of compulsory licensing transforms the patent regime from a monopolistic system to a royalty system involving a certain degree of free-market competition. The extent of this transformation depends upon the reasons for, and conditions under which, these licences are allowed. To have any effect on the scope of rights, the terms of the compulsory licence must be subject to some control by an entity independent of the owner of the subject matter. Compulsory licences can be divided into two categories: licences for misconduct and licences as of right.

## Misconduct

Compulsory licences granted in the event of misconduct on the part of the patentee ensure that the subject matters over which the monopoly rights have been imparted are not wasted. If the patentee fails to bring the protected subject matter to the public, he or she loses the right to absolute exclusivity and another individual is permitted to work the patent. In cases of abuse, compulsory licences are essential to satisfy society's interest in making the subject matters available by a method that ensures the innovator will be rewarded.

# Of Right

Compulsory licences as of right greatly limit the rights of patent owners. This control mechanism is used to reduce the waste of resources and the potential for abuse intrinsic in monopolistic control, while concurrently preserving the patentee/innovator's market position and allowing the licensee/exploiter to avoid needless duplication of research and development efforts. The patentee's exclusive property rights are transformed into an entitlement to monetary remuneration based on the exploitive efforts of others. This limitation will not meet the objectives of the patent system unless the royalties or commissions payable provide a rate of return adequate to sustain continued research and development. 305

Compulsory licensing is used in the area of food and drug products to try to encourage domestic research and development and market competition aimed at preventing excessive pricing. Many products and processes in the new reproductive technologies will fall under the food and drug category. It may be difficult to deviate from these provisions, given the extensive level and currency of research that has produced the existing provisions regarding compulsory licences. Compulsory licences over products and processes that are within the mandate but do not consist of food and drugs may be advisable if a system of reward is essential, but the costs to society involved in exclusive market control are unusually high.

Compulsory licences may also be appropriate if the demand for a particular subject matter or class of subject matters is unresponsive to price variations.

Definition of Infringement

The definition of infringement is a key element in creating the appropriate scope of proprietary protection. The patent system defines subject matters by function and structure, and accordingly protects the ideas embodied in the subject matters. The doctrine of equivalents protects the underlying concept by extending the basic right of exclusivity to any other subject matter that achieves essentially the same result in essentially the same manner. This doctrine is central to the creation of a meaningful proprietary system that promotes rather than stifles progress. The doctrine of equivalents is the enforcement complement to the concept of unobviousness. It defines the practical scope of patents. Since the doctrine of equivalents determines the breadth of patent claims, if it is applied too restrictively insignificant alterations to inventions will be patented and crowd the field of protected subject matters to the point of meaning-lessness.

## Exceptions to Infringement

Exceptions to infringement are another tool used to balance the competing interests involved in any proprietary regime. Exceptions to infringement, which allow others to encroach upon the exclusive domain of the innovator without sanction, can be divided into commercial and non-commercial areas.

# Non-Commercial Exceptions

Non-commercial exceptions to infringement exist in almost every intellectual property law paradigm. Their purpose is to recognize the paramount importance of the progress of science over and above the property rights of any individual. Non-commercial use exceptions permit the free use of ideas and works for educational and research purposes. These exceptions must also be crafted to accommodate situations where non-commercial uses of protected subject matters yield commercial results. In such a case, the proprietary interests of the original innovator will generally be preserved through the mechanism of voluntary or compulsory licensing, which also permits a subsequent inventor to work the improvement or derivative product. If it is decided that the subsequent inventor should not be subject to the rights of the original inventor, then the voluntary licensing mechanism would be less appropriate. The concept of a non-commercial-use exception could be expanded in a way analogous to the "reverse engineering" exception found in the integrated topography paradigm to validate an unencumbered property interest in the improvement or derivative product.

## Commercial Exceptions

In certain circumstances, exceptions for the use of protected subject matter for commercial purposes may be desired, with or without compensation to the owner of the subject matter. If compensation is indicated, then compulsory licensing can be used to facilitate this need. If compensation is not considered advisable, then an express exception may be appropriate. Such exceptions should be limited to specific situations or products and should be created only in response to recognized and accepted industry practices that would otherwise constitute infringement. Examples of exceptions to the general principles of infringement for commercial use are found in the breeders' rights and integrated topography areas. Farmers are entitled to use protected propagating materials to create seed for future crops. In the computer industry, any innovator may use the topography of any competitor to create his or her own original topography. Once again, these exceptions are limited to specific situations and are based on the grounds of public policy or industry practice.

## Exhaustion

Generally, once a protected subject matter is sold, it may be freely used or resold. In the area of new reproductive technologies this rule should be modified to cover the rights of the purchaser and the seller regarding the use of propagating material and the cells resulting from a protected subject matter. The European Draft Directive creates a suitable legislative answer to this problem. By statute, the owner may sue for infringement if the purchaser uses the propagative ability of the subject matter or the cells resulting from the subject matter for commercial purposes.<sup>307</sup>

# **Practical Implementation**

When crafting a proprietary regime for advances in new reproductive technologies, the practicality of the proposed system must also be considered. Many of the criticisms levelled against the patent system itself are really concerns regarding the practical inefficiencies due to a lack of adequately trained staff and the complex nature of many current applications. These inefficiencies result in delays in the granting of patent rights, 308 which tend to increase the attractiveness of secrecy as an alternate form of protection.

Despite these inefficiencies, it is advisable that ongoing advances in new reproductive technologies that are ethical should remain within the general patent system for several reasons:

- 1. Subject to possible legislative fine-tuning of the threshold criteria, the patent system is most suited to the provision of protection to these innovations.
- 2. As the field of new reproductive technology is extremely broad and diverse, it has the potential to cross over into a number of

- other fields currently dealt with under the patent system. Therefore, a separate system would result in duplicative efforts regarding registration, in addition to possibly conflicting or irreconcilable problems involving priorities.
- 3. Disclosure in the appropriate system must be adequate to define the exact parameters of exclusivity, to permit usage for research during the period of exclusivity, and to permit general usage thereafter. Disclosure of this degree requires substantive examination, which would make an independent system covering advances in new reproductive technologies much more costly to implement than many of the other specialized regimes. As the plant breeders' and topography regimes involve low threshold requirements, no substantive evaluation occurs before registration; it is consequently a less onerous task to establish a separate registration system in those fields.
- 4. Due to the existing expertise and potential to realize economies of scale, this type of disclosure would be most efficiently facilitated through one central, existing location with an established indexing system for internal and external use. The patent office likely represents the best suited, most efficient central location for proprietary protection of advances in new reproductive technologies.

# Part 6 — Conclusions and Recommendations

# **Recommendation 1: Proprietary Interest**

Based on an international review of intellectual property laws and international experience, it appears that the products and processes relevant to new reproductive technologies are currently grouped within the more general field of biotechnology and are protected under the auspices of various existing general patent regimes.

Subject to further study, as indicated in these recommendations, we conclude that some form of proprietary protection is needed to provide an incentive for continued research and development in those new reproductive technologies that are ethical. The patent or quasi-patent paradigms appear to be most suited to provide this individual protection while ensuring the interests of society as a whole are served.

# **Recommendation 2: Human Beings**

While the international review reveals that all products involved in the new reproductive technologies are potentially protectable under the existing patent systems, a general abhorrence of the recognition of proprietary interests over subject matters comprising complete human life forms is also evident. This concern has resulted in specific prohibitions against the issuance of patents over "human beings." The term "human beings" is not defined, but it appears in this context to include the potential for human life embodied in human fetuses and embryos. Perhaps it is therefore better to use these specific terms, namely, human embryos and fetuses.

We conclude that while the general prohibitions over immoral or illicit patents would preclude the issuance of patents over human life forms in any event, the extraordinary nature of this subject matter may warrant the inclusion of an express prohibition within the patent law paradigm. In drafting this prohibition, we recommend that careful attention be paid to the potential effect that the wording of any intellectual property law prohibition may have on the traditional legal definition of human being. To this end, we recommend that the patent regime be altered to include a provision prohibiting the patenting of human fetuses or human embryos.

# **Higher Life Forms**

There is a general international movement to increase both the level of proprietary interests and the subject matter capable of proprietary protection. This movement is evidenced in proposed amendments to the various patent systems to accommodate animate subject matters. These amendments are focussed in two directions: possible relaxations of the threshold patent criteria to extend the scope of exclusivity to currently unpatentable, yet commercially valuable, subject matters; and adjustments to the rights conferred under the existing system to account for factors such as the ability of self-replication inherent in living subject matters. Proponents of these changes point to the large capital investments required for research and development, and the consequent need for legislative certainty as opposed to piecemeal, judicial extension and possible misapplication of general intellectual property principles to the biotechnology field. In Canada in particular, the judiciary has expressed a reluctance to provide general guidelines for the limits of the patent system. Further, judicial precedents have created uncertainty regarding the limits of patentable subject matter in relation to higher life forms and the role of viable deposits to fulfil the enabling criterion.

Therefore, we recommend the enactment of specific provisions to confirm or prohibit the patenting of living materials and, in particular, of higher life forms.

## **Ethical Decisions**

We recognize that ethical implications are important and relevant to the provision of proprietary interests. We also conclude that direct legislative or administrative regulation of research and development activities is preferable to after-the-fact, indirect proscription within the property law as a method of controlling research and development activities within the new reproductive technologies.

If advances in the new reproductive technologies are determined to be ethically acceptable, we recommend such advances be included in a proprietary regime that appropriately rewards the innovator and promotes societal interests.

## Relevance of Further Studies

The importance of industrial, administrative, and independently obtained information regarding market conditions in crafting an appropriate intellectual property paradigm has been stressed throughout this report.

Further study would be needed to define the exact parameters of processes and products within the mandate; identify the market conditions and any special policy considerations surrounding the commercialized supply and demand of these products and processes; determine the dynamic interaction between public and private institutions and between basic and applied research involved in innovations in new reproductive technologies; obtain the input of industry to determine its present and future intellectual property needs; and ascertain the practical difficulties involved in the present system and implement a parallel hybrid system through consultation with officials in the patent office.

If further studies reveal the need for specialized provisions or modifications to the patent system, such changes should be accommodated within the general patent system to avoid the unwarranted proliferation of novel intellectual property paradigms and needless complication and duplication of administrative requirements.

# Appendix 1

# (Preparatory Acts) COMMISSION

Proposal for a Council Directive on the legal protection of biotechnological inventions

COM(88) 496 final - SYN 159

(Submitted by the Commission on 20 October 1988)

(89/C 10/03)

## THE COUNCIL OF THE EUROPEAN COMMUNITIES.

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100A thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas differences exist in the legal protection of biotechnological inventions offered by the laws and practices of the Member States and such differences could create barriers to trade and to the creation and proper functioning of the internal market;

Whereas such differences in legal protection could well become greater as Member States adopt new and different legislation and administrative practices or as national jurisprudence interpreting such legislation and practices develops differently;

Whereas biotechnology and genetic engineering are playing an increasingly important role in a broad range of industries and the protection of biotechnological inventions can be considered of fundamental importance for the Community's industrial development;

Whereas the patent system must adapt to new technological developments which may involve living matter but which also fulfil the requirements for patentability;

Whereas no prohibition or exclusion exists in national or international patent laws which precludes the patentability of living matter as such;

Whereas national patent systems have in the past successfully adapted to technical developments and scientific breakthroughs in according patent protection to such developments where appropriate;

Whereas the investments required in research and development particularly for genetic engineering are especially high and especially risky and the

possibility for recouping that investment can only effectively be guaranteed through adequate legal protection;

Whereas without effective and approximated protection throughout the Member States of the Community, such investments might well never be made;

Whereas some inventions developed through biotechnology and genetic engineering are at present not clearly protected in all Member States by existing legislation, administrative practice, and court jurisprudence, and such protection, where it exists, is not the same or has different attributes;

Whereas the uncoordinated development in the Community of the legal protection for biotechnological inventions in the Member States could result in the creation of new disincentives to trade to the detriment of further industrial development in such inventions and of the completion of the internal market;

Whereas existing differences having such effects need to be removed and new ones having a negative impact on the functioning of the common market and the development of trade in biotechnological goods and services prevented from arising;

Whereas international developments in the field of legal protection of the results of biotechnology and genetic engineering demonstrate the advantages to be gained from approximation of national legislation;

Whereas scientific and technological developments are often a result of international collaboration on research and, in consequence, need exists to ensure that biotechnological inventions may benefit from comparable protection on an international level;

Whereas international instruments exist or are under consideration to harmonize various aspects of the legal protection of biotechnological inventions, they are not sufficient for Community purposes which must take account of the needs of Community science and industry and a Community market;

Whereas the patent laws applicable at present in the Member States contain disparities which hinder the development of trade in biotechnological goods and services, distort competition within the common market and therefore directly affect the establishment and functioning of that market; whereas it is particularly important to remove these disparities because at the stage reached at present in establishing the common market, there would appear to be an urgent need to ensure that undertakings will be offered the possibility of obtaining effective and equivalent legal protection in all Member States for the results of their research activities in any part of the Community;

Whereas an approximation of the legislation of the Member States is also necessitated by existing language in national laws originating in certain

international patent and plant variety conventions which have given rise to considerable uncertainty as to the possibility of protecting biotechnological inventions concerning plant matter and microbiological inventions, language such as the exclusion from patentability of plant and animal varieties and of essentially biological processes for the production of plants and animals;

Whereas it is necessary to encourage potential innovation in the full range of human endeavours by recognizing that human intervention which consists of more than the selection of biological material and allowing such material to perform inherently biological functions under natural conditions should be considered patentable subject matter and should not be regarded as essentially biological;

Whereas it is seemly that the legislation of the Member States should be harmonized in such a way so as not to conflict with the existing international conventions on which many Member States' patent and plant variety laws are based;

Whereas the Community's legal framework on the protection of biotechnological inventions can be limited to laying down certain principles as they apply to the patentability of living matter as such; to the ability to use a deposit mechanism in lieu of written descriptions to satisfy the enabling disclosure requirements for patent application procedures; to a reversal of the burden of proof where release of self-replicable matter has occurred and to the right to a non-exclusive dependency license for plant and animal varieties:

Whereas, in view of the fact that the function of a patent is to reward the inventor with an exclusive but time-bound right for his creative efforts and thereby encourage inventive activities, the rightholder should be entitled to prohibit the use of patented self-replicable material in situations analogous to those where it would be permitted to prohibit such use of patented, non-self-replicable products, i.e. in respect of the production of the patented product itself;

Whereas, in the area of agricultural exploitation of new plant characteristics resulting from genetic engineering, guaranteed remunerated access in the form of licenses of right must be provided for as an exception to the general principles of patent law,

HAS ADOPTED THIS DIRECTIVE:

#### CHAPTER 1

# Patentability of living matter

Article 1

Member States shall ensure that their national patent laws comply with the provisions of this Directive.

## Article 2

A subject matter of an invention shall not be considered unpatentable for the reason only that it is composed of living matter.

## Article 3

- 1. Micro-organisms, biological classifications other than plant or animal varieties as well as parts of plant and animal varieties other than propagating material thereof of the kind protectable under plant variety protection law shall be considered patentable subject matter. Claims for classifications higher than varieties shall not be affected by any rights granted in respect of plant and animal varieties.
- 2. Notwithstanding the provisions of paragraph 1, plants and plant material shall be considered patentable subject matter unless such material is produced by the non-patentable use of a previously known biotechnological process.

#### Article 4

Uses of plant or animal varieties and processes for the production thereof shall be considered patentable subject matter.

## Article 5

Microbiological processes shall be considered patentable subject matter. For purposes of this Directive, this term shall be taken to mean and to include a process (or processes) carried out with the use of or performed upon or resulting in a micro-organism.

## Article 6

A process consisting of a succession of steps shall be regarded a microbiological process, if the essence of the invention is incorporated in one or more microbiological steps of the process.

## Article 7

A process in which human intervention consists in more than selecting an available biological material and letting it perform an inherent biological function under natural conditions shall be considered patentable subject matter.

### Article 8

A subject matter of an invention, including a mixture, which formed an unseparated part of a pre-existing material, shall not be considered unpatentable for the reason that it formed part of said natural material.

## Article 9

A subject matter of an invention, including a mixture, which formed an unseparated part of a pre-existing material, shall not be considered as an unpatentable discovery or as lacking novelty for the reason only that it formed part of said natural material.

## **CHAPTER 2**

## Scope of protection

#### Article 10

The use of a product protected by a patent comprising or consisting of genetic information to develop another such product or the use of a patented process to obtain such a product shall not be regarded experimental for purposes of establishing patent infringement, if the developed product obtained from the experiments, or its progeny in identical or differentiated form, is used for other than private or experimental purposes.

#### Article 11

If a product enjoying patent protection and put on the market by the patentee or with his consent is self-replicable, the rights conferred by the national patent shall not extend to acts of multiplication and propagation only where such acts are unavoidable for commercial uses other than multiplication and propagation.

#### Article 12

- 1. If the subject matter of a patent is a process for the production of living matter or other matter containing genetic information permitting its multiplication in identical or differentiated form, the rights conferred by the patent shall not only extend to the product initially obtained by the patented process but also to the identical or differentiated products of the first or subsequent generations obtained therefrom, said products being deemed also directly obtained by the patented process.
- 2. Any extension of the protection conferred by the patent to a process as indicated under paragraph 1 to a product obtained thereby shall not be affected by any exclusion of plant or animal varieties from patentability.

#### Article 13

The protection for a product consisting of or containing particular genetic information as an essential characteristic of the invention shall extend to any products in which said genetic information has been incorporated and is of essential importance for its industrial applicability or utility.

#### CHAPTER 3

## Dependency license for plant varieties

## Article 14

- 1. If the holder of a plant breeders' right or a variety certificate can exploit or exercise his exclusive rights only by infringement of the rights attached to a prior national patent, a non-exclusive license of right shall be accorded to the breeders' right holder to the extent necessary for the exploitation of such breeders' right where the variety protected represents a significant technical progress, upon payment of reasonable royalties having regard to the nature of the patented invention and consistent with giving the proprietor of such patent due reward for the investment leading to and developing the invention.
- 2. A license under paragraph 1 shall not be available prior to the expiration of three years from the date of the grant of the patent or four years from the date on which the application for a patent was filed, whichever period last expires.
- 3. If a license according to paragraph 1 has been granted, and if a variety protected by a plant breeders' right or variety certificate can be exploited by the patentee only by infringement of the rights attached to such variety, a non-exclusive license shall be accorded to the original patentee to the extent necessary for the exploitation of the breeders' right or variety certificate, upon payment of reasonable royalties having regard to the nature of the improvement and consistent with giving the proprietor of the breeders' right due reward for the investment leading to and developing the new variety.
- 4. Where disagreements arise with regard to the significance of the technical progress and as to the level of royalties, Member States shall provide for a court of competent jurisdiction to resolve the dispute.

#### **CHAPTER 4**

# Deposit, access and re-deposit

## Article 15

1. If an invention involves the use of a micro-organism or other self-replicable matter which is not available to the public and which cannot be described in a patent application in such a manner as to enable the invention to be carried out by a person skilled in the art, or if it concerns such matter *per se*, the invention shall only be regarded as being disclosed for purposes of national patent law if:

- (a) the micro-organism or other self-replicable matter has been deposited with a recognised depositary institution not later than the date of filing of the application;
- (b) the application as filed gives such relevant information as is available to the applicant on the characteristics of the micro-organism or other self-replicable matter;
- (c) the depositary institution and the file number of the deposit are stated in the application.
- 2. The information referred to in paragraph 1(c) may be submitted:
- (a) within a period of sixteen months after the date of filing of the application, or, if priority is claimed, after the priority date;
- (b) up to the date of submission of a request for early publication of the application;
- (c) within one month after the national patent office has communicated to the applicant that a right to inspection of the files exists pursuant to paragraph 3(a)(ii) below.

The ruling period shall be the one which is the first to expire. The communication of this information shall be considered as constituting the unreserved and irrevocable consent of the applicant to the deposited matter being made available to the public in accordance with this Article.

- (3) (a) Unless the application has been refused or withdrawn or is deemed to be withdrawn, the deposited matter shall be available upon request:
  - (i) to any person from the date of publication of the patent application; and
  - (ii) to any person having a right to inspect the files under the provisions of national patent law relating to applications under which rights are invoked against such a party, prior to the date of publication;
  - (b) Subject to the provisions of paragraph 4, such availability shall be effected by the issue of a sample of the deposited matter to the person making the request (hereinafter referred to as the 'requester'). Said issue shall be made only if the requester has undertaken vis-à-vis the applicant for or proprietor of the patent:
    - (i) not to make the deposited matter or any matter derived therefrom available to any third party;
    - (ii) to use the deposited matter or any matter derived therefrom in any country only for experimental purposes concerning the invention, with the proviso that this restriction will cease, in the country of the patent right on the basis of which the sample of the deposited matter was obtained, with

the grant of a patent or other enforceable right in the invention involved. This provision shall not apply in the country of the patent right on the basis of which the sample of the deposited matter was obtained insofar as the requester is using the matter under a compulsory license. The term 'compulsory license' shall be construed as including <code>ex officio</code> licenses and the right to use patented inventions in the public interest.

- 4. Until the date on which the technical preparations for publication of the application are deemed to have been completed, the applicant may inform the national patent office that, until the publication of the mention of the grant of the patent, the availability referred to in paragraph 3 shall be effected only by the issue of a sample to an expert nominated by the requester.
- 5. The following may be nominated as an expert:
- (a) any natural person provided that the requester furnishes evidence, when filing the request, that the nomination has the approval of the applicant;
- (b) any natural person recognized as an expert by the national patent office. The nomination shall be accompanied by an undertaking from the expert *vis-à-vis* the applicant; paragraphs 3(b)(i) and (ii) shall apply, the requester being regarded as a third party.
- 6. For the purposes of paragraph 3(b), any matter derived from the deposited matter shall be deemed to be any matter derived therefrom by culturing or in any other way of replication which matter still exhibits those characteristics of the deposited matter which are essential to or for carrying out the invention. The undertaking referred to in paragraph 3(b) shall not impede a deposit of derived matter, necessary for the purposes of patent procedure.
- 7. The request provided for in paragraph 3 shall be submitted to the national patent office on a form recognized by that office. The national patent office shall certify on the form that a national patent application referring to the deposit of the micro-organism or other self-replicable matter has been filed, and that the requester or the expert nominated by him is entitled to the issue of a sample of the micro-organism or other self-replicable matter.
- 8. The national patent office shall transmit a copy of the request, with the certification provided for in paragraph 7, to the depositary institution as well as to the applicant for, or the proprietor of, the patent.
- 9. Member States shall designate recognized depositary institutions for purposes of this Article.

10. If a micro-organism or other self-replicable material has been deposited in accordance with paragraphs 1 and 2 and has become available to any person or an expert in accordance with paragraph 3 or 4, it shall henceforth be regarded available to the public in accordance with paragraph 1.

## Article 16

- 1. If a micro-organism or other self-replicable matter deposited in accordance with Article 15 ceases to be available from the institution with which it was deposited because:
- (a) the micro-organism or other self-replicable matter is no longer viable; or
- (b) for any other reason the depositary institution is unable to supply samples;

and if the micro-organism or other self-replicable matter has not been transferred to another depositary institution recognized for the purposes of Article 15, from which it continues to be available, an interruption in availability shall be deemed not to have occurred if a new deposit of the micro-organism or other self-replicable matter originally deposited is made within a period of three months from the date on which the depositor was notified of the interruption by the depositary institution and if a copy of the receipt of the deposit issued by the institution is forwarded to the national patent office within four months from the date of the new deposit stating the number of the application or of the national patent.

- 2. In the case provided for in paragraph 1(a), the new deposit shall be made with the depositary institution with which the original deposit was made; in the cases provided for in paragraph 1(b), it may be made with another depositary institution recognized for the purposes of Article 15(9).
- 3. Where the institution with which the original deposit was made ceases to be recognized for the purposes of the application of Article 15, whether entirely or for the kind of micro-organism or other self-replicable matter to which the deposited micro-organism or other self-replicable matter belongs, or where that institution discontinues, temporarily or definitively, the performance of its functions as regards deposited micro-organisms or other self-replicable matter, and the notification referred to in paragraph 1 from the depositary institution is not received within six months from the date of such event, the three-month period referred to in paragraph 1 shall begin on the date on which this event is announced in the official publication of the national patent office.
- 4. Any new deposit shall be accompanied by a statement signed by the depositor alleging that the newly deposited micro-organism or other self-replicable matter is the same as that originally deposited.

- 5. If the new deposit provided for in the present Article has been made under the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure of 28 April 1977, the provisions of that Treaty shall prevail in case of conflict.
- 6. If a deposit is not accepted or if the deposited material is no longer available from the depository institution and a re-deposit according to paragraphs 1 to 5 does not or could not remedy the unavailability, such unavailability shall not affect the patentability of the invention if the applicant/patentee provides the requesting party entitled to receive a sample with such sample certifying its identity with the material used in the invention or obtained as the invention or with the originally deposited material, as the case may be.
- 7. If a patent is deemed invalid because the patentee can no longer provide for a sample of the deposited material in accordance with this Article, such invalidity shall in no case have retroactive effects.

#### **CHAPTER 5**

## Reversal of the burden of proof

#### Article 17

- 1. If the subject matter of a patent is a process for obtaining a new or known product, the same product when produced by any other party shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process, if a necessary means to carry out the process had been deposited in accordance with Article 14 and had been released to a third party.
- 2. In the adduction of proof to the contrary, the legitimate interests of the defendant in protecting his manufacturing and business secrets shall be taken into account.

#### **CHAPTER 6**

## Miscellaneous

#### Article 18

Any exclusion from patentability or from the field of industrial applicability of surgical or diagnostic methods practised on an animal body shall apply to such methods only if practised for a therapeutic purpose.

#### Article 19

For the purposes of this Directive:

(a) the word 'micro-organism', where used, shall be interpreted in its broadest sense as including all microbiological entities capable of

- replication, e.g. as comprising, *inter alia*, bacteria, fungi, viruses, mycoplasmae, rickettsiae, algae, protozoa, and cells; and
- (b) the words 'self-replicable matter', where used, shall be interpreted to comprise also matter possessing the genetic material necessary to direct its own replication via a host organism or in any other indirect way, e.g. as comprising, *inter alia*, seeds, plasmids, DNA sequences, protoplasts, replicons and tissue cultures.

## Article 20

- 1. Member States shall bring into force the laws necessary to comply with this Directive not later than 31 December 1990.
- 2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

## Article 21

This Directive is addressed to the Member States.

## Notes

This document expresses the view of the authors and does not necessarily represent those of the Royal Commission on New Reproductive Technologies.

- 1. Trego v. Hunt [1895-99] All E.R. 804 (H.L.) at 809-10 and 813.
- 2. R.S.C. 1985, c. T-13; as amended by S.C. 1990, c.14, c.20; S.C. 1992, c.1.
- 3. Sections 9, 10, 10.1, 12, and 13 of the Trade-marks Act define which trademarks are not capable of protection. Section 12 provides
  - 12(1) Subject to section 13, a trade-mark is registrable if it is not
    - (a) a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding thirty years;
    - (b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;
    - (c) the name in any language of any of the wares or services in connection with which it is used or proposed to be used;
    - (d) confusing with a registered trade-mark;
    - (e) a mark of which the adoption is prohibited by section 9 or 10; or
    - (f) a denomination the adoption of which is prohibited by section 10.1

Section 9 prohibits marks that may be confused with certain royal, governmental, or international symbols.

Sections 10 and 10.1 prohibit the use of marks that by common usage have become symbols of, or which may be confused with symbols of, the kind, quality, quantity, destination value, place of origin, or date of productions of any particular ware or designation that must be used in conjunction with plant breeders' varieties.

Section 13 permits the registration of any shape or mode of wrapping of any ware provided that it has been used and consequently has become distinctive prior to its registration and that its registration will not impede the development of any art or industry.

- 4. Ibid., section 16.
- 5. Ibid., sections 6 and 19-21.
- 6. Ibid., section 46.
- 7. Ibid., section 48.
- 8. Ibid., section 53.
- 9. R.S.C. 1985, c. I-9; as amended by R.S.C. 1985 (4th Supp.), c.10; S.C. 1992, c.1.
- 10. Ibid., section 2.
- 11. Ibid., section 6.
- 12. Ibid., section 14.
- 13. Ibid., sections 6 and 8.
- 14. Ibid., section 21.
- 15. Ibid., section 9.
- 16. Ibid., sections 11 and 16.
- 17. Ibid., section 5.1.
- 18. Ibid., section 15.
- 19. Ibid., section 10.
- 20. Ibid., section 13.
- 21. Copyright Act, R.S.C. 1985, c. C-42; as amended by R.S.C. 1985 (1st Supp.), c.10; R.S.C. 1985 (3rd Supp.), c.1, c.41; R.S.C. 1985 (4th Supp.), c.10; S.C. 1988, c.65; S.C. 1990, c.37; S.C. 1992, c.1.
- 22. See Apple Computer Inc. et al. v. Macintosh Computers Ltd. et al. (1986) 10 C.P.R. (3d) 1 (F.C.) at 21-27 where Madame Justice Reed reviews Canadian case law on merger; affirmed by (1988) 18 C.P.R. (3d) 129 (F.C.A.) and (1990) 30 C.P.R. (3d) 257 (S.C.C.).
- 23. Cuisenaire v. South West Imports Ltd. (1969) 57 C.P.R. 76 (S.C.C.).
- 24. Copyright Act, section 3(1.1).
- 25. Ibid., section 53(2).
- 26. Ibid., section 27.
- 27. Ibid., section 6; however, a number of exceptions do exist: copyright in post-humous works lasts for a 50-year period commencing on publication (section 7); copyright in works of joint authorship lasts generally for the life of the survivor plus

50 years (section 9); copyright in photographs lasts for 50 years from the date the original negative was made (section 10); copyright in works involving sound reproductions lasts for 50 years from the date that the original is made (section 11); copyright in government publications lasts for 50 years from the date of publication (section 12).

- 28. Ibid., section 70.7(1).
- 29. Ibid., section 15.
- 30. Ibid., section 8(1).
- 31. Ibid., section 27(2)(a).
- 32. Ibid., sections 34-40.
- 33. D. Smith, "Copyright Protection for the Intellectual Property Rights to Recombinant Deoxyribonucleic Acid: A Proposal," St. Mary's Law Journal 19 (1988): 1083-1113, favours this approach; for an opposing point of view see D.L. Burk, "Copyrightability of Recombinant DNA Sequences," Jurimetrics Journal 29 (1989): 469-532; I.P. Cooper, Biotechnology and the Law (New York: Clark Boardman Callaghan, 1991) at section 11.02.
- 34. Apple Computer Inc. (1986). It has not yet been established in Canada whether the doctrine of merger will be applied or what effect it will have upon the scope of proprietary protection copyright can provide to underlying ideas encompassed in expressions.
- 35. M.B. Nimmer and D. Nimmer, Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas (New York: Matthew Bender, 1991), Volume 3 section 13.03 [B] [2] [a]; [3] and 13.03 [F][2].
- 36. Ibid.
- 37. See F.K. Beier, R.S. Crespi, and J. Straus, *Biotechnology and Patent Protection:* An International Review (Paris: Organisation for Economic Co-operation and Development, 1985).
- 38. U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Patenting Life (New York: Marcel Dekker, 1990), 43-44; and also Cooper, Biotechnology and the Law at section 11.02.
- 39. In the patent regime this difficulty has been overcome internationally by the adoption of a first-to-file priority system; the United States is one of a very few remaining nations that adhere to a patent priority system determined by a first-to-invent system; see note 59 below.
- 40. H.G. Fox, Digest of Canadian Patent Law (Toronto: Carswell, 1957), 8.
- 41. R.A. Armitage, "The Emerging US Patent Law for the Protection of Biotechnology Research Results," European Intellectual Property Review 11 (2)(1989), 49-50.
- 42. Patent Act, R.S.C. 1985, c. P-4, section 42; as amended by R.S.C. 1985 (3rd Supp.), c.33; S.C. 1992, c.1.
- 43. See E.B. Lipscomb III, *Lipscomb's Walker on Patents*, 3d ed. (Rochester: Lawyers' Co-operative Publishing, 1987), Volume 6 section 22.34 at 544-45.
- 44. For a discussion of equivalency and its ramifications see R.L. Baechtold et al., "Property Rights in Living Matter: Is New Law Required?" *Denver University Law Review* 68 (1991), 154-61 and especially 160-61.

- 45. Patent Act, section 27.
- 46. Ibid., section 2; one notable exception to this first-to-file system is the United States, where priority is determined by a first-to-invent rule, see note 59 below.
- 47. Fox, Digest of Canadian Patent Law, 74-76.
- 48. Transfers are registered at the Patent Office, Patent Act, section 50(2).
- 49. In Canada the rights conferred under the Patent Act, section 44, last for 20 years; previously the monopoly was only 17 years in duration; in the United States the usual term of a patent is 17 years, Utility Patent Act, 35 U.S.C. (1982) (United States), section 154.
- 50. In Canada there are no such provisions to extend a patent.
- 51. For example, under sections 155 and 157 of the Utility Patent Act (United States), the term of a patent may be extended in the food and drug industries; Australia has also enacted similar provisions: Patents Act 1990 (Australia), 1990, No. 83, section 70. Furthermore, the member states of the European Patent Convention (EPC) have recently reached an agreement permitting the extension of European patent rights beyond their usual 20-year term; see European Intellectual Property Review 14 (2)(1992), D-34 citing EPO release 3/91.
- 52. Patent Act, section 19(1) provides that patented inventions may be used for governmental purposes provided that the inventor is reasonably compensated.
- 53. Ibid., sections 65-67.
- 54. Ibid., sections 55-59.
- 55. Ibid., section 2; and Utility Patent Act (United States), section 101.
- 56. E.W. Kintner and J. Lahr, An Intellectual Property Law Primer, 2d ed. (New York: Clark Boardman, 1982), 18-21; Fox, Digest of Canadian Patent Law, 10-11.
- 57. Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd. (1981) 56 C.P.R. (2d) 145 (S.C.C.) at 160.
- 58. See R.S. Crespi, Patenting in the Biological Sciences: A Practical Guide for Research Scientists in Biotechnology and the Pharmaceutical and Agrochemical Industries (Chichester: John Wiley & Sons, 1982), 76-78.
- 59. In recent World Intellectual Property Organization (WIPO) negotiations aimed at harmonization of intellectual property laws internationally, the United States is attempting to implement a standard 12-month grace period for disclosures by the inventor or any party who obtained information from the inventor see E.G. Fiorito, "The 'Basic Proposal' for Harmonization of U.S. and Worldwide Patent Laws Submitted by WIPO," *Journal of the Patent and Trademark Office Society* 73 (1991), 92, and also "News Section International News WIPO Commentary," *European Intellectual Property Review* 12 (6)(1990): D-119-D-120.
- 60. L.L. Greenlee, "Biotechnology Patent Law: Perspective of the First Seventeen Years, Prospective on the Next Seventeen Years," *Denver University Law Review* 68 (1991), 129-31; see also K.H. Murashige, "Section 102/103 Issues in Biotechnology Patent Prosecution," *AIPLA Quarterly Journal* 16 (1988), 301-302; but in Canada a recent decision of the Federal Court of Appeal has brought the patentability of life forms into question; see note 151 below and accompanying text.
- 61. Fox, Digest of Canadian Patent Law, 13.

- 62. See R.P. Merges, "A Brief Note on Blocking Patents and Reverse Equivalents: Biotechnology as an Example," *Journal of the Patent and Trademark Office Society* 73 (1991): 878-88.
- 63. Fox, Digest of Canadian Patent Law, 25-26.
- 64. Crespi, Patenting in the Biological Sciences, 87-88.
- 65. Cooper, Biotechnology and the Law, sections 1.19-1.20.
- 66. These criteria were set out in the American case of Graham v. John Deere Company of Kansas City et al. 383 US 1 (Fed. Cir. 1966).
- 67. Murashige, "Section 102/103 Issues," 297-300; see also K. Kelly, "The Elimination of Process: Will the Biotechnology Patent Protection Act Revive Process Patents?" John Marshall Law Review 24 (1990), 266-67.
- 68. R.G. Hirons, "Pioneer and Biotech Patenting Under the New Canadian Patent Act," Canadian Intellectual Property Review 6 (1990), 195-96.
- 69. The use of deposits to obtain international protection is provided for under the Budapest Treaty A Treaty for the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, (1977) (modified in 1980) signatories include Australia, Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, Finland, France, Germany, Hungary, Italy, Japan, Liechtenstein, Netherlands, Norway, Philippines, Republic of Korea, Soviet Union, Spain, Sweden, Switzerland, United Kingdom, and the United States (as of December 1991) per *Industrial Property: Monthly Review of the World Intellectual Property Organization* 32 (1992), 16.
- 70. In Canada all such inventions are subject to additional regulation under the Atomic Energy Control Act, R.S.C. 1985, c. A-16.
- 71. See, for example, the Patents Act 1990 (Australia), sections 147-153; the Utility Patent Act (United States), sections 181-188; and the Patent Act, section 22.
- 72. Atomic Energy Act, 42 U.S.C. (1982) (United States), section 2181.
- 73. Patent Act, sections 39-39.26; the Australian patent system also prohibited the grant of patents over food and drug products; however, this exclusion was dropped under the latest patent act; see note 250 below and accompanying text.
- 74. See E. Hill and J. Steinberg, "Bill C-22 and Compulsory Licensing of Pharmaceutical Patents," Canadian Intellectual Property Review 4 (1987), 45.
- 75. Canada, Commission of Inquiry on the Pharmaceutical Industry, *Report* (Ottawa: Minister of Supply and Services Canada, 1985).
- 76. The restriction was to last four years from the date of assent; section 39 received royal assent on 19 November 1987.
- 77. Patent Act, subsections 39(1),(2).
- 78. Ibid., subsections 39(3),(4).
- 79. Hill and Steinberg, "Bill C-22 and Compulsory Licensing," 45-46; and also J.W. Rogers III, "The Revised Canadian Patent Act, the Free Trade Agreement and Pharmaceutical Patents: An Overview of Pharmaceutical Compulsory Licensing in Canada," European Intellectual Property Review 12 (10)(1990), 355-56.
- 80. Patent Act, section 39(3).

- 81. Hill and Steinberg, "Bill C-22 and Compulsory Licensing," 49-52; K.P. Murphy, "A Review of Pharmaceutical Patent Practice Under the Amended Patent Laws," Canadian Intellectual Property Review 6 (1989), 41-43.
- 82. Patent Act, section 39.15(3).
- 83. Canada, Commission of Inquiry on the Pharmaceutical Industry, *Report*, 333-69, discusses in detail the necessity of variable rates.
- 84. Hill and Steinberg, "Bill C-22 and Compulsory Licensing," 46-47; Rogers, "The Revised Canadian Patent Act," 356 (15 percent of bulk selling price is also a standard royalty rate).
- 85. See note 51 above.
- 86. See Rogers, "The Revised Canadian Patent Act," 358.
- 87. The UPOV Convention of December 2, 1961, as revised at Geneva on 10 November 1972 and on 23 October 1978.
- 88. Parties to the 1961 version include Australia, Belgium, Canada, Czechoslovakia, Denmark, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Netherlands, New Zealand, Poland, South Africa, Spain, Sweden, Switzerland, United Kingdom, and the United States; parties to the 1972 version include Belgium, Denmark, France, Germany, Israel, Italy, Netherlands, South Africa, Spain, Sweden, Switzerland, and the United Kingdom; parties to the 1978 act include Australia, Canada, Czechoslovakia, Denmark, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Netherlands, New Zealand, Poland, South Africa, Sweden, Switzerland, United Kingdom, and the United States per Industrial Property: Monthly Review of the World Intellectual Property Organization 32 (1992), 18.
- 89. Plant Breeders' Rights Act, S.C. 1990, c.20.
- 90. Plant Patents Act (1930) 35 U.S.C. (1982) c.15 (United States), which applies to asexually produced plants, and the Plant Variety Protection Act 7 U.S.C. (1982) c. 57 (United States), which protects sexually produced plants.
- 91. Lipscomb, *Ltpscomb's Walker on Patents*, Volume 5 section 17.2 at 174 referring to the Congressional Reports regarding the introduction of plant patent protection.
- 92. This requirement is very common and has been the source of much of the variance in protection from one jurisdiction to another. The Canadian regulations protect the following varieties: rape, chrysanthemum, soybean, rose, potato, and wheat.
- 93. Plants Breeders' Rights Act, section 7.
- 94. Ibid., subsections 4(1)-4(3).
- 95. Ibid.
- 96. The Plant Variety Protection Act (United States), section 2422(3) requires the deposit of a viable seed sampling as a condition of registration.
- 97. The Plants Breeders' Rights Act, section 30.
- 98. Ibid., section 6(1).
- 99. Ibid., section 5.

- 100. W.L. Hayhurst, "Exclusive Rights in Relation to Living Things," *Intellectual Property Journal* 6 (1991), 185-86.
- 101. Plant Breeders' Rights Act, sections 32-33; under the Plant Varieties and Seeds Act 1964 (U.K.), c.14, section 7, as amended by the Plant Varieties Act 1983 (U.K.), 1983, c. 17, the holder of a certificate must grant licences on reasonable terms at the request of other parties.
- 102. Plant Breeders' Rights Act, section 41.
- 103. There is no counterpart to the patent law doctrine of equivalents in the plant breeders' rights system. See N.J. Seay, "Protecting the Seeds of Innovation: Patenting Plants," *AIPLA Quarterly Journal* 16 (1988): 418-41.
- 104. Recall that in Canada neither the patent system nor the plant breeders' system has a mandatory deposit requirement.
- 105. The 1991 act was not in force as of the end of 1991; signatories include Belgium, Denmark, France, Germany, Israel, Italy, Netherlands, New Zealand, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and the United States per *Industrial Property: Monthly Review of the World Intellectual Property Organization* 32 (1992), 18.
- 106. UPOV Article 13 as cited in B. Greengrass, "The 1991 Act of the UPOV Convention," European Intellectual Property Review 13 (12)(1991): 466-72.
- 107. Currently, in the United States multiple protection is available to plant inventions under the Plant Variety Protection Act, the Plant Patents Act, and the Utility Patent Act; see *Ex Parte Hi*<sup>th</sup> berd, note 172 below.
- 108. UPOV Article 2 as cited in Greengrass, "The 1991 Act," 467.
- 109. UPOV Article 14 as cited in Greengrass, "The 1991 Act," 469.
- 110. UPOV Article 14(2) as cited in Greengrass, "The 1991 Act," 470.
- 111. See "International News WIPO Commentary UPOV," European Intellectual Property Review 13 (10)(1991): D-208.
- 112. UPOV Article 14(5) as cited in Greengrass, "The 1991 Act," 470-71.
- 113. See M. Kratz, "Semiconductor Chip Protection in Canada," Canadian Computer Law Reporter 4 (1987): 170-78.
- 114. R.L. Risberg, Jr., "Five Years Without Infringement Litigation Under the Semiconductor Chip Protection Act: Unmasking the Spectre of Chip Piracy in an Era of Diverse and Incompatible Process Technologies," *Wisconsin Law Review* 24 (1990), 242-43 and 276.
- 115. Ibid., 251.
- 116. The Design Right (Semiconductor Topographies) Regulations 1989 (U.K.) (SI 1989/1100), (of 29 June 1989).
- 117. Act Concerning the Circuit Layout of a Semiconductor Integrated Circuit (Japan), Law No. 43, 1985.
- 118. Circuit Layouts Act 1989 (Australia), 1989, No. 28.
- 119. Protection of Semiconductor Chip Products, 17 U.S.C. c.9 (1988), Public Law 98-620, 8 November 1984 (United States).
- 120. Integrated Circuit Topography Act, S.C. 1990, c.37.

- 121. For an international review of integrated topography protection see A.D. Morrow, "Integrated Circuits The New Canadian Law," *Canadian Intellectual Property Review* 7 (1991): 357-87.
- 122. Treaty on Intellectual Property in Respect of Integrated Circuits (1989), done at Washington, DC, 26 May 1989; signed by China, Egypt, Ghana, Guatemala, India, Liberia, Yugoslavia, and Zambia this treaty was not yet in force as of December 1991 per Industrial Property: Monthly Review of the World Intellectual Property Organization 32 (1992), 17.
- 123. Council Directive of 16 December 1986, on the Legal Protection of Topographies of Semiconductor Products (87/54/EEC) Official Journal of the European Community 30 (1987) L24 at 36 (27 January 1987).
- 124. Morrow, "Integrated Circuits," 357.
- 125. Integrated Circuit Topography Act, section 5: the 10-year period commences upon registration and ends according to the terms of section 5(b) upon the expiry of
  - "... the tenth calendar year after the earlier of the calendar year in which the topography is first commercially exploited and the calendar year of the filing date of the application."
- 126. Ibid., section 3(2).
- 127. Ibid., section 3(3).
- 128. Ibid., section 4(2).
- 129. Ibid., section 4(1)(b).
- 130. Ibid., section 16. This section also requires disclosure of additional information as may be prescribed by regulations; however, as of 31 December 1991 no regulations have come into force.
- 131. Ibid., section 18(2).
- 132. Ibid., subsections 6(2),(3).
- 133. Ibid., section 9.
- 134. Ibid., section 10.
- 135. Risberg, "Five Years Without Infringement Litigation," 276-77.
- 136. Institute of Law Research and Reform, and a Federal Provincial Working Party, *Trade Secrets*, Report No. 46 (Edmonton: The Institute, July 1986), 7. This report recommends the enactment of a statutory tort to protect trade secrets, under section 1 of the proposed Trade Secrets Protection Act. Trade secrets are defined as (p. 256):

information including but not limited to a formula, pattern, compilation, programme, method, technique, or process, or information contained or embodied in a product device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

138. For example see Canada, National Biotechnology Advisory Committee, National Biotechnology Business Strategy: Capturing Competitive Advantage for Canada (Ottawa: Minister of Supply and Services Canada, 1991); United States, Office of Science and Technology Policy, Biotechnology for the 21st Century: The FY 1993 Biotechnology Research Intitative: A Report from the Federal Coordinating Council for Science, Engineering and Technology Committee on Life Sciences and Health (Washington, DC: The Committee, 1992).

139. Her Honour Judge Michèle Rivet, Commissioner, Law Reform Commission of Canada, "Patenting Life-Forms and Owning Human Tissue," address to the Canadian Institute for the Administration of Justice, Vancouver, August 1989.

140. R.S.C. 1985, c. P-4; as amended by R.S.C. 1985 (3rd Supp.), c.33; S.C. 1992, c.1.

141. S.C. 1990, c.20.

142. Section 34 of the Patent Act provides:

- (1) An applicant shall in the specification of his invention
  - (a) correctly and fully describe the invention and its operation or use as contemplated by the inventor;
  - (b) set out clearly the various steps in a process, or the method of construction, making, compounding or using a machine, manufacture or composition of matter, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected, to make, construct, compound or use it;
  - (c) in the case of a machine, explain the principle thereof and the best mode in which he has contemplated the application of that principle;
  - (d) in the case of a process, explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions; and
  - (e) particularly indicate and distinctly claim the part, improvement or combination that he claims as his invention.
- (2) The specification referred to in subsection (1) shall end with a claim or claims stating distinctly and in explicit terms the things or combinations that the applicant regards as new and in which he claims an exclusive property or privilege.
- 143. (1982) 62 C.P.R. (2d) 81.
- 144. See note 169 below and accompanying text.
- 145. Abitibi (1982), 87.

- 146. Ibid., 86-87.
- 147. Ibid., 89.
- 148. Ibid., 90.
- 149. Hirons, "Pioneer and Biotech Patenting," 200.
- 150. A.G. Creber and E.J. McKhool, "Recent Developments in Protecting Plants and Seeds Under the Canadian Patent Act," *Canadian Intellectual Property Review* 3 (1987): 27-39.
- 151. Re Application for Patent of Pioneer Hi-Bred Ltd. (1986) 11 C.P.R. (3d) 311 (Patent Appeal Board and Commissioner of Patents).
- 152. Ptoneer Hi-Bred Ltd. v. Commissioner of Patents (1987) 14 C.P.R. (3d) 491 (F.C.A.).
- 153. (1989) 25 C.P.R. (3d) 257 (S.C.C.).
- 154. Ibid., 271.
- 155. See, for example, Ledgley and Stewart, "Patent Protection," 291, which points out that the overall precedent value of this decision is limited by the fact it involved traditional cross-breeding techniques and that the disclosure filed at the patent office was quite vague and clearly inadequate.
- 156. Hirons, "Pioneer and Biotech Patenting," 207.
- 157. See Hayhurst, "Exclusive Rights," 176; and also J.R. Rudolph, "Biotechnology, Pioneer Hi-Bred and Patent Law: Judicial Expertise Missing?" Canadian Intellectual Property Review 7 (1991), 76-77.
- 158. Canadian Patent Office, *Manual of Patent Office Practice and Transitional Manual of Patent Office Practice* (Ottawa: CPO, January 1990), Chapter 12.03.01 (a) and Chapter 12.03.02.
- 159. Ibid., Chapter 12.03.02.
- 160. Ibid.
- 161. Ibid.
- 162. Tennessee Eastman Co. et al. v. Commissioner of Patents (1973) 8 C.P.R. (2d) 202 (S.C.C.) at 207 applied in Imperial Chemical Industries Ltd. v. Commissioner of Patents (1986) 9 C.P.R. (3d) 289 (F.C.A.) at 296.
- 163. Patent Act, sections 39, 40 create a mandatory licensing scheme irrespective of any actions taken by the patent holder to work his invention.
- 164. See Canada, Consumer and Corporate Affairs Canada, *Patenting Life Forms and Processes* (Ottawa: Consumer and Corporate Affairs Canada, Bureau of Policy Coordination, 1986).
- 165. 35 U.S.C. (1982) c.15 (United States), sections 161-164.
- 166. 7 U.S.C. (1982) c.57 (United States).
- 167. 35 U.S.C. (1982) (United States).
- 168. Greenlee, "Biotechnology Patent Law," 127-29.
- 169. 447 U.S. 303 (C.C.P.A. 1980).
- 170. Ibid., 313.

- 171. Ibid., 316-18.
- 172. Ex Parte Hibberd 227 U.S.P.Q. 443 (Bd. Pat. App. & Int. 1985).
- 173. Ex Parte Allen 2 U.S.P.Q. (2d) 1425 (Bd. Pat. App.& Int. 1987).
- 174. As reproduced in "Animals Patentability," Journal of the Patent and Trademark Office Society 69 (1987), 328.
- 175. M.E. Wheeler, "Patenting in the Bio-technology Field," *Canadian Intellectual Property Review* 4 (1988): 295-305; R. Dresser, "Ethical and Legal Issues in Patenting New Animal Life," *Jurimetrics Journal* 28 (1988), 405-406 and 415-16, which outlines the consequences of commodification of semi-human organisms.
- 176. See, for example, Bill H.R. 3119, 100th Cong. 2d sess., and Bill S. 2111, 100th Cong. 2d sess. (United States).
- 177. See R.L. King, "The Modern Industrial Revolution: Transgenic Animals and the Patent Law," Washington University Law Quarterly 67 (1989): 653-59.
- 178. Bills H.R. 4970 and H.R. 4971, 100th Cong. 2d sess., reintroduced as H.R. 1556 and H.R. 1557, 101st Cong. 1st sess. (1989); it appears that these bills were not reintroduced into the 102d session of Congress.
- 179. See, for example, Greenlee, "Biotechnology Patent Law," 130-31; Murashige, "Section 102/103 Issues," 301-302.
- 180. See I. McAndrews, "Removing the Burden of Durden Through Legislation: HR 3957 and HR 5664," *Journal of the Patent and Trademark Office Society* 72 (1990): 1188-1218; Kelly, "The Elimination of Process," 280.
- 181. As enunciated in the general patent part of this report.
- 182. Murashige, "Section 102/103 Issues," 296; and also P.B.C. Jones, "Patentability of the Products and Processes of Biotechnology," *Journal of the Patent and Trademark Office Society* 73 (1991), 387 referring to the American categories set out by the Federal Court of Appeal decision of *In Re O'Farrell* 853 F.2d 894 (Fed. Cir. 1988) at 903.
- 183. 763 F.2d 1406 (Fed. Cir. 1985).
- 184. Ibid., 1409-11.
- 185. D. Beier and R.H. Benson, "Biotechnology Patent Protection Act," *Denver University Law Review* 68 (1991), 176-77 and accompanying cases *In Re Mancy* 499 F.2d 1289 (C.C.P.A. 1974).
- 186. Kelly, "The Elimination of Process," 264 and 280-81; see also Jones, "Patentability of the Products and Processes," 388-89.
- 187. See H.C. Wegner, "Much Ado About Durden," Journal of the Patent and Trademark Office Society 71 (1989), 798.
- 188. 910 F.2d 823 (Fed. Cir. 1990).
- 189. Ibid., 828.
- 190. See H.C. Wegner, "Biotechnology Process Patents: Judicial or Legislative Remedy," Journal of the Patent and Trademark Office Society 73 (1991): 24-28.
- 191. 919 F.2d 688 (Fed. Cir. 1990).

- 192. See A.P. Klein, "In Re Dillon II: The Federal Circuit Adopts a New Obviousness Standard for Inventions Combining Old Elements," Journal of the Patent and Trademark Office Society 73 (1991): 214-17; Kelly, "The Elimination of Process"; see also M.M. Wall and J. Dituri, "The En blanc Rehearing of In Re Dillon: Policy Considerations and Implications for Patent Prosecution," Denver University Law Review 68 (1991), 271-76, esp. 272 and 276 points out that this decision also increased the required standard of obviousness in relation to biotechnological products involving composition claims.
- 193. Jones, "Patentability of the Products and Processes," 394-95.
- 194. For a more complete discussion of the problems of blocking patents see Merges, "A Brief Note on Blocking Patents."
- 195. Ibid.; Jones, "Patentability of the Products and Processes."
- 196. In Re Lundak 773 F.2d 1216 (Fed. Cir. 1985).
- 197. T.D. Denberg and E.P. Winner, "Requirements for Deposits of Biological Materials for Patents Worldwide," *Denver University Law Review* 68 (1991), 243-45.
- 198. 37 Code of Federal Regulations c.1, sections 1.801-1.825 (United States).
- 199. Armitage, "The Emerging US Patent Law," 53-54.
- 200. Denberg and Winner, "Requirements for Deposits of Biological Materials," 243.
- 201. H.R. 5664, 101st Cong. 2d sess., referred to Committee on the Judiciary; reintroduced into the current session as The Biotechnology Patent Protection Act of 1991 H.R. 1417, 102d Cong. 1st sess., and also into the Senate as S. 654, 102d Cong. 1st sess.
- 202. Jones, "Patentability of the Products and Processes," 388-89.
- 203. Kelly, "The Elimination of Process," 269-70 and 281.
- 204. Amgen v. United States International Trade Commission 902 F.2d 1532 (Fed. Cir. 1990). Chugai Pharmaceutical and Chugai Pharma U.S.A. Inc. as intervenors.
- 205. Public Law 100-418, sec 9002 and 9003, 102 Stat. at 1563-64, which adds section 271(g) to the Utility Patent Act (United States).
- 206. Hayhurst, "Exclusive Rights," 177; G.F. Burch, "Ethical Considerations in the Patenting of Medical Processes," *Texas Law Review* 65 (1987), 1146-47; George J. Annas, "Surrogate Embryo Transfer The Perils of Patenting," *Hastings Center Report* 14 (June 1984): 25-26.
- 207. Annas, "Surrogate Embryo Transfer."
- 208. Burch, "Ethical Considerations."
- 209. For example U.S. patent number 4,816,257 was issued in 1989 to John E. Buster and assigned to Research and Education Institute, Harbour U.C.L.A Medical Center I and covered a method to create a suitable environment for human embryo transfer; U.S. patent number 5,005,583 was issued in 1991 to Maria Delcarmen Bustillo and assigned to Research and Education Institute, Inc., Harbour U.C.L.A. Medical Center and covered a method for the diagnosis and treatment of infertile women involving the recovery of ova by lavage source abstracts of United States Patents found in the United States, United States Department of Commerce Patent and Trade-mark Office, Office of the Patent and Trade-mark Depository Library Programs CASSIS BIB/CD-ROM, August 1991.

- 210. Uniform Anatomical Gift Act 8A U.L.A. (1987 and Supp. 1991), National Organ Transplant Act 42 U.S.C. (1988) (United States), section 274e(a); see Stanford University Medical Center Committee on Ethics, "The Ethical Use of Human Fetal Tissue in Medicine," New England Journal of Medicine 320 (1989): 1093-96.
- 211. J.M. Hillebrecht, "Regulating the Clinical Uses of Fetal Tissue A Proposal for Legislation," *Journal of Legal Medicine* 10 (1989), 295-98.
- 212. 45 Code of Federal Regulations sections 46.201-46.211 (United States).
- 213. Ibid., section 46.209.
- 214. Ibid., section 46,210.
- 215. Hillebrecht, "Regulating the Clinical Uses of Fetal Tissue," 294-95; G.J. Annas and S. Elias, "The Politics of Transplantation of Human Fetal Tissue," *New England Journal of Medicine* 320 (1989): 1079-82.
- 216. J. Palca, "Fetal Tissue Transplants Remain off Limits," *Science* 246 (1989): 752; C. Anderson, "Battle Lines Form over Fetal Tissue Research," *Nature* 355 (1992): 189.
- 217. National Institutes of Health Revitalization Amendments of 1991 (United States), H.R. 2507, 102d Cong. 1st sess.; see also Anderson, "Battle Lines Form."
- 218. The proposed National Institutes of Health Revitalization Amendments of 1991 (United States), section 498 permits research involving the transplantation of fetal tissues for research purposes and requires the donating woman to give an informed written statement of consent, which will be maintained and made available in the event of an audit.
- 219. As the European Patent Office Reports Journal and European Patent Office Practice Guidelines were unavailable, access to the decisions of the European Patent Office and the technical board of appeals was available to the writers only through secondary sources such as the European Intellectual Property Review and The European Patents Sourcefinder. Further, references to decisions and proposals of the Council of European Communities were available through the Official Journal of the European Communities and noted up through the Bulletin of the European Communities Commission and the Index to the Official Journal. Legislative enactments were also updated through the Official Journal of the European Communities, Directory of Community Legislation in Force and Other Acts of the Community Institution as at 1 June 1991 and the European Communities Legislation Current Status (Autumn 1991).
- 220. International treaties that affect these countries include the Patent Cooperation Treaty and the Community Patent Convention (not in force as of December 1991), the European Economic Community Treaty, and the Convention on the Unification of Certain Points of Substantive Law on Patents for Inventions (the "Strasbourg Convention"). The cumulative effect of these treaties and others was to create the European Economic Community and standardize both procedural and substantive aspects of domestic patent rights in Western European countries.
- 221. The EPC was concluded in Munich 5 October 1973; not all of the members of the EEC are also subject to the EPC; subject states include Austria, Belgium, Denmark, France, Germany, Greece, Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Portugal, Spain, Sweden, Switzerland, and the United Kingdom (as of

December 1991) per Industrial Property: Monthly Review of the World Intellectual Property Organization 32 (1992), 20.

- 222. The exact meaning of this article is somewhat ambiguous as the official French and German versions of the EPC are not equivalent. See V. Vossius, "Case Comment: Patent Protection for Animals; Onco-mouse/HARVARD," European Intellectual Property Review 12 (7)(1990): 250-54.
- 223. For example, section 1 (3) of the Patents Act of 1977 (U.K.), 1977, c. 37 as amended provides:

A patent shall not be granted - ...

- (b) for any variety of animal or plant or any essentially biological process for the production of animals or plants, not being a micro-biological process or the product of such a process.
- 224. This void is only partially filled as currently plant variety protection schemes protect only a finite enumerated selection of varieties; further, protected varieties vary from one jurisdiction to the next.
- 225. Beier et al., Biotechnology and Patent Protection, 26-29, esp. 28; see also Vossius, "Case Comment: Patent Protection," 253.
- 226. I.L. Fuller, "Intellectual Property Rights Associated with Biotechnology An International Trade Perspective," AIPLA Quarterly Journal 16 (1988), 534; Office of Technology Assessment, New Development in Biotechnology, 161-62; Commission of the European Communities, "Proposal for a Council Directive on the Legal Protection of Biotechnological Inventions," Official Journal of the European Community 32 (1989): C10/3-C10/8 (13 January 1989).
- 227. Cooper, Biotechnology and the Law, section 6.05; see also Office of Technology Assessment, New Developments in Biotechnology, 160-61.
- 228. European application No. 85304490.7.
- 229. "News Section European Institutions European Patent Office," European Intellectual Property Review 12 (4)(1990): D-82-D-83.
- 230. "News Section European Institutions European Patent Office," European Intellectual Property Review 13 (4)(1991): D-77.
- 231. Ibid.; see also the abstract of the decision in Chartered Institute of Patent Agents, European Patents: Sourcefinder (Essex: Longman, 1991), T2285 citing as sources EPOJ 1990/12 476; EPOR 1990/7 501.
- 232. P. Aldhous, "Europe Approves First Transgenic Animal Patent," *Nature* 353 (1991): 589.
- 233. The Biotechnology Research for Innovation Development and Growth (BRIDGE) is one of a number of recent initiatives designed to promote biotechnology in Europe and is the subject of a number of Council Decisions. See Official Journal of the European Community 32 (1989), L360 at 32 (9 December 1989) EC89/621. The Council of the European Communities has shown a great commitment to the development of this area in initiating other programs involving biotechnology and biomedicine; see "Proposal for Council Decision Adopting a Specific Program of Research and Technological Development in the Field of Biotechnology," Official Journal of the European Community 33 (1990), C174 at 53 (16 July 1990) and "Council Decision," Official Journal of the European Community 33 (1990), L117 at

28 (5 May 1990) EC90/221. The Commission is also in the process of creating an advisory body to deal with ethical issues involved in biotechnology; see *Bulletin of the European Communities Commission* 24 (11)(1991), 61.

234. The terms of the Proposed Directive require member states to ensure compliance with its articles. It was to have been enacted not later than 31 December 1990. However, this proposal has not been officially enacted; the proposal was reviewed by the Economic and Social Committee, which endorsed the proposal subject to certain modifications including the adoption of an express exclusion of "human beings" in the fall of 1990; see *Bulletin of the European Communities Commission* 22 (4)(1989), 24.

235. See Bulletin of the European Communities Commission 21 (10)(1988), 20.

236. Commission of the European Communities, Draft Directive, Article 2.

237. Ibid., Article 3, but note this *Draft Directive* predates the revisions to the UPOV whereby double protection is no longer outlawed; see notes 107 and 108 above and accompanying text.

238. Ibid., Article 4.

239. Ibid., Article 7.

240. Ibid., Articles 11-13; see also R. Whaite and N. Jones, "Biotechnological Patents in Europe — The Draft Directive," European Intellectual Property Review 11 (5)(1989), 150.

241. Commission of the European Communities, Draft Directive, Articles 15-16.

242. Ibid., Article 3.

243. Ibid., Chapter 3. Under Article 14 of this Chapter a plant breeder may obtain a licence of right from a patentee provided that the exploitation or exercise of his or her variety rights necessarily involves infringement upon the patentee's rights.

244. See the Council of Europe, Parliamentary Assembly, Official Report of Debates, 38th Session, Strasbourg, September 1986, 509-33; the revised report is also reproduced in "Council of Europe, Parliamentary Assembly: Recommendation 1046 (1986) (1) on the Use of Human Embryos and Fetuses for Diagnostic, Therapeutic, Scientific, Industrial and Commercial Purposes," Human Reproduction 2 (1987): 67-75; see also Parliamentary resolutions on the bioethics, specifically the ethical treatment of human embryos and artificial fertilization techniques: Official Journal of the European Community 32 (1989), C96 at 165 (17 April 1989).

245. (U.K.), 1990, c.37.

246. D. Kirk, "Germany to Ban Embryo Use," *Science* 245 (1989): 464. A translation of the Embryo Protection Act appears in *Human Reproduction* 6 (1991), 605-606 (translation by H.M. Beier and J.O. Beckman).

247. Primary sources regarding patent applications and Official Patent Office Reports were unavailable to the authors. Information was obtained through secondary source material searches and reviews of The Australian Current Law to 1992, The Australian Digest to 1992, and various general reporting series.

248. Patents Act 1990 (Australia), 1990, No. 83.

#### 249. Ibid., section 18(1) provides:

Subject to subsection (2), a patentable invention is an invention that, so far as claimed in any claim:

- (a) is a manner of manufacture within the meaning of section 6 of the Statute of Monopolies; and
- (b) when compared with the prior art base as it existed before the priority date of that claim:
  - (i) is novel; and
  - (ii) involves an inventive step; and
- (c) is useful; and
- (d) was not secretly used in the patent area before the priority date of that claim by, or on behalf of, or with the authority of, the patentee or nominated person or the patentee's or nominated person's predecessor in title to the invention.
- 250. Ibid., section 18(2).
- 251. Patent Act 1952 (Australia), 1952, No. 42, section 155(1).
- 252. See D. Eilison, "Patents and Micro-organisms," Law Institute Journal 61 (1987): 1141-43; and Office of Technology Assessment, New Developments in Biotechnology, 162.
- 253. J. Slattery, "Recent Patent Law Developments Affecting Biotechnology," *Law Institute Journal* 63 (1989): 485-87 citing the *Australian Official Journal of Patents* (1980): 1162.
- 254. Slattery, "Recent Patent Law Developments," 485-86.
- 255. Patents Act 1990 (Australia), sections 6, 41, and 42 set out the disclosure requirements; Ellison, "Patents and Micro-organisms," 1141 outlines the changes that have been made to the Patent Act (1952) (Australia), to facilitate the use of deposits in compliance with the enablement criterion.
- 256. Beier et al., Biotechnology and Patent Protection, 69.
- 257. Statute of Monopolies 21 Jac. I (U.K.), c.3. Many modern patent regimes are based on this statute, which banned all but a select few monopolies to protect the public from exploitation due to exclusive market control. Monopolies over medical treatments were not permitted under this statute as they were not believed capable of an industrial purpose.
- 258. See Joos v. Commissioner of Patents [1972] A.L.J.R. 438 (H.C.) at 440-43. This case dealt with a method of improving the elasticity of human hair and nails and reviewed the historical rationale and case law regarding the exclusion of medical treatment from the realm of patentable subject matter.
- 259. The Commonwealth of Australia has attempted to standardize the regulation of new reproductive technologies through the *Human Experimentation Bill*; however this bill has not become law (based on a review of statutes of 1990). Also a private member's bill, An Act to Prohibit Experiments Involving the Use of Human Embryos Created By Invitro Fertilization, was introduced into the Australian Senate in April 1985. The private bill would have banned all non-therapeutic experimentation; however, it also failed to become law.

The State of Victoria enacted the Infertility (Medical Procedures) Act 1984 (Victoria, Australia), 1984, No. 10163, which includes a licensing system, counselling, bans surrogacy, bans certain embryo research including cloning, cross species experimentation, and the creation of embryos solely for research purposes (section 6). This act was amended in 1987 by the Infertility (Medical Procedures) (Amendment) Act 1987 (Victoria, Australia), 1987, No. 86 to define embryo in clearer terms.

South Australia enacted the Reproductive Technology Act, 1988 (South Australia), 1988, No. 10, which also puts limitations on various types of research on human embryos; the In Vitro Fertilization (Restriction) Act, 1987 (South Australia), 1987, No. 27 as amended by the In Vitro Fertilization (Restriction) Act Amendment Act, 1987 (South Australia), 1987, No. 83, which limits the facilities where such procedures can be performed; and the Family Relationships Act Amendment Act, 1988 (South Australia), 1988, No. 2, which bans commercial surrogacy.

260. The issue of ownership of raw starting materials encompassed in body parts to rem as distinct from intellectual property protection as the end product of commercial invention is dealt with in the case of Moore v. The Regents of the University of California et al. 271 Cal. Rptr. 146 (Cal. 1990) at 159-60, which has been commented on in a number of journals; see, for example, C. Heyer, "Moore v. Regents of University of California: The Right of Property in Human Tissue and Its Effect on Medical Research," Rutgers Computer and Technology Law Journal 16 (1990), 662-64; see also W.D. Noonan, "Ownership of Biological Tissue," Journal of the Patent and Trademark Office Society 72 (1990), 110-11.

261. See Dresser, "Ethical and Legal Issues," 413-14 where it is acknowledged that ethics is best dealt with through the regulation of activity rather than regulation of intellectual property.

262. See D.E. Korn, "Patent and Trade Secret Protection in University-Industry Research Relationships in Biotechnology," *Harvard Journal on Legislation* 24 (1987), 196.

263. See Canada, National Biotechnology Advisory Committee, National Biotechnology Business Strategy.

264. Hillebrecht, "Regulating the Clinical Uses of Fetal Tissue," 281-83 and 285.

265. See in general J.H. Howard, "Biotechnology, Patients' Rights, and the *Moore* Case," *Food, Drug, Cosmetic Law Journal* 44 (1989), 336-38; and also G.J. Annas, "Who's Afraid of the Human Genome?" *Hastings Center Report* 19 (July-August 1989), 20-21 regarding the repercussions of the human genome project on new reproductive technologies.

266. Howard, "Biotechnology, Patients' Rights," 338-40.

267. Hillebrecht, "Regulating the Clinical Uses of Fetal Tissue," 280-91 including desacralization of life; increases pressure on women to supply fetuses; impacts on abortion decisions; and the possibility of large-scale commercial fetal production.

268. For example, the mixing of human and animal gametes and the creation of chimeras from humans and other animals, particularly primates, are expressly prohibited in various statutes; see Human Fertilization and Embryology Act 1990 (U.K.), 1990, c.37, section 4; see also the Infertility (Medical Procedures) Act 1984 (Victoria, Australia); see also Law Reform Commission of Canada, *Biomedical* 

 $\label{lem:experimentation} \textit{Experimentation Involving Human Subjects}, \textit{Working Paper 61 (Ottawa: LRCC, 1989)}, \\ 49-54.$ 

- 269. See note 174 above.
- 270. Hillebrecht, "Regulating the Clinical Uses of Human Tissue," 280-91.
- 271. Ibid., 286-87.
- 272. Ibid., 308-10.
- 273. The NIH application and its implications are discussed in greater detail below, under "Appropriate Level of Protection."
- 274. D. Macer, "Whose Genome Project?" Bioethics 5 (1991), 195-201.
- 275. See Annas, "Surrogate Embryo Transfer," note 206 above and accompanying text.
- 276. American Fertility Society Ethics Committee, "Ethical Considerations of the New Reproductive Technologies," Fertility and Sterility 46 (Suppl. 1)(1986), 24S-25S.
- 277. H.C. Wegner, "Purified Protein Patents: 'A Legal Process Gone Berserk,'" European Intellectual Property Review 12 (6)(1990): 187-90 argues for international intellectual property regimes to recoup the enormous development costs in biotechnology.
- 278. Korn, "Patent and Trade Secret Protection."
- 279. Ibid., 195.
- 280. The necessity of the patent system in creating economic incentive to risk capital is outlined in P.D. Rosenberg, *Patent Law Fundamentals*, 2d ed. (New York: Clark Boardman Callaghan, 1990), vol. 1, sec. 1.07-1.08.
- 281. See Institute of Law Research and Reform et al., *Trade Secrets*, 109-15, where attention is brought to the fact that the economical necessity of the patent system is difficult to measure due to absence of alternate structures, but that various formal studies have endorsed its use.
- 282. For example, the efficacy and desirability of the patent system were questioned on a number of occasions, including during the mid-1970s in Canada, Consumer and Corporate Affairs Canada, *Working Paper on Patent Law Revision* (Ottawa: Minister of Supply and Services Canada, 1976), 92-93, which recognized the need for some type of economic reward and raised the possibility of abandoning the patent system entirely in favour of a royalty system.
- 283. See Canada, Commission of Inquiry on the Pharmaceutical Industry, *Report*, 333-34, which suggested a shortened period of exclusivity followed by a variable royalty entitlement of limited duration.
- 284. Canada, National Biotechnology Advisory Committee, National Biotechnology Business Strategy, 12 and 23-24.
- 285. See Canada, National Biotechnology Advisory Committee, *National Biotechnology Business Strategy*; Beier and Benson, "Biotechnology Patent Protection Act," 183; Greenlee, "Biotechnology Patent Law," 138-39; and the Preamble to the *Draft Directive*.
- 286. See Rivet, "Patenting Life-Forms," which outlines Canada's participation in international efforts regarding trade and intellectual property; see also Greenlee, "Biotechnology Patent Law," 138-39.

287. Fiorito, "The 'Basic Proposal' for Harmonization," reviews proposed international uniform provisions; in addition to efforts by WIPO, international negotiations on trade-related aspects of intellectual property (TRIPS) have occurred as part of the General Agreement on Tariffs and Trade (GATT) negotiations.

288. Fuller, "Intellectual Property Rights," 536-37; see also Wegner, "Purified Protein Patents," who points out the view that standardized commercial protection is necessary to spread the huge costs of research and development amongst all who stand to benefit from the results of those efforts.

289. Economic Council of Canada, *Report on Intellectual and Industrial Property* (Ottawa: Information Canada, 1971), 84-85 endorsed the continued application of a patent system designed to meet the following goals:

- (1) The Canadian patent system should encourage invention and other steps in the total innovative process within Canada.
- (2) It should encourage rapid and effective dissemination of technical information and other "technological transfer", both within Canada and between the rest of the world and Canada.
- (3) It should facilitate the making of a fair Canadian contribution, but no more than that, to the economic costs of providing appropriate special incentives to research and innovation the world over.
- (4) It should be compatible with Canada's broader strategy of economic development and science policy. For example, it should not encourage, as it might if the working-in-Canada provisions of the existing Patent Act were vigorously enforced, a new proliferation of small-scale, high-cost manufacturing in Canada. Rather, it should help to promote the kind of internationally competitive pattern of secondary manufacturing that was envisaged in the "Scale and Specialization" chapter of the Economic Council's Fourth Annual Review. While working of foreign inventions in Canada is normally the most complete and effective means of technological transfer into Canada, it is achieved at too high a cost if it results in Canadian resources being used in productive ventures that can never aspire to exports and can only go on existing domestically behind an absolute patent barrier to imports. In such cases efforts should be concentrated on conveying knowledge of the relevant technology into Canada by other means, on a purely informational basis for the time being.
- (5) The reformed Canadian patent system should be administratively workable, without any major net addition to existing overheads, but with provision for a more effective performance review than has been possible in the past. There should also be more effective interrelation with other government policies bearing on industrial innovation. A more thorough-going preparation for Canadian participation in international patent conferences is also appropriate since these constitute an activity related to a vital national economic interest.

Although these objectives were enunciated 20 years ago they are relevant currently.

290. See Dresser, "Ethical and Legal Issues," 419-20, which outlines the general concerns regarding commercialization of academic research; see also Korn, "Patent and Trade Secret Protection," 201-208, which details problems involving a shift in

focus of academic research from public benefit to commercial potential, corruption of the academic ethos involving loss of academic freedom, loss of peer review, lack of commitment, increased potential for conflict situations, and proliferation of secrecy.

- 291. The implementation of the new use may infringe upon the existing patent, and therefore the permission of the patentee of the existing invention may be required to lawfully work the new use.
- 292. See *Re Application for Patent of Pioneer Hi-Bred* (1986), note 151 above and accompanying text, which appear to indicate that, putting aside any ethical issues, in Canada it would not be possible to patent human embryos.
- 293. L. Roberts, "Genome Patent Fight Erupts," Science 254 (1991): 184-86.
- 294. The origins of the project are succinctly outlined in James Dewey Watson and Robert Mullan Cook-Deegan, "Origins of the Human Genome Project," *FASEB Journal* 5 (1991): 8-11.
- 295. Macer, "Whose Genome Project?" 192-93.
- 296. L. Roberts, "Who Owns the Human Genome?" Science 237 (1987): 358-61.
- 297. S. Jenks, "Congress Weighs NIH Bid for Patent Rights to Human Genes," *Journal of the National Cancer Institute* 84 (2)(1992): 76.
- 298. Roberts, "Genome Patent Fight Erupts," 185.
- 299. L. Roberts, "NHI Gene Patents, Round Two," *Science* 255 (1992), 913; Christopher Anderson, "US Patent Application Stirs Up Gene Hunters," *Nature* 353 (10 October1991): 485-86.
- 300. Roberts, "NHI Gene Patents," 912.
- 301. Macer, "Whose Genome Project?" 194-201 discusses the role of patent protection regarding the human genome project.
- 302. Officials with MRC have denied secrecy allegations, but admit considering the implementation of a user fee system; see L. Roberts, "MRC Denies Blocking Access to Genome Data," *Science* 254 (1991): 1583; see also C. Anderson and P. Aldhous, "Genome Project Secrecy and the Bottom Line," *Nature* 354 (1991): 96.
- 303. C. Anderson and P. Aldhous, "Genome Project Faces Commercialization Test," *Nature* 355 (1992): 483-84. Scientists employed by the new corporation have stated that they will patent genes only if the practice becomes acceptable and only once their functions have been uncovered (p. 484).
- 304. See American Society of Human Genetics, Human Genome Committee and Board of Directors, "The Human Genome Projects and Patents," letter to the editor published in *Science* 254 (1991): 1710-12; "Free Trade in Human Sequence Data?" *Nature* 354 (1991): 171-72.
- 305. Canada, Commission of Inquiry on the Pharmaceutical Industry, Report, 362-63.
- 306. Canada, Commission of Inquiry on the Pharmaceutical Industry, Report.
- 307. Whaite and Jones, "Biotechnological Patents in Europe," 150.
- 308. Canada, National Biotechnology Advisory Committee, *National Biotechnology Business Strategy*, 24, estimates a 50-year backlog in patent applications based on current statistics.

309. Section 223 of the Criminal Code, R.S.C. 1985, c. C-46 as amended defines when a child becomes a human being for the purposes of criminal culpability for homicide as follows:

- 233. (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not
  - (a) it has breathed;
  - (b) it has an independent circulation; or
  - (c) the navel string is severed.
- (2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

See also R. v. Sullivan et al. (1991) 63 C.C.C. (3d) 97 (S.C.C.), which determined that a fetus is not a human being.

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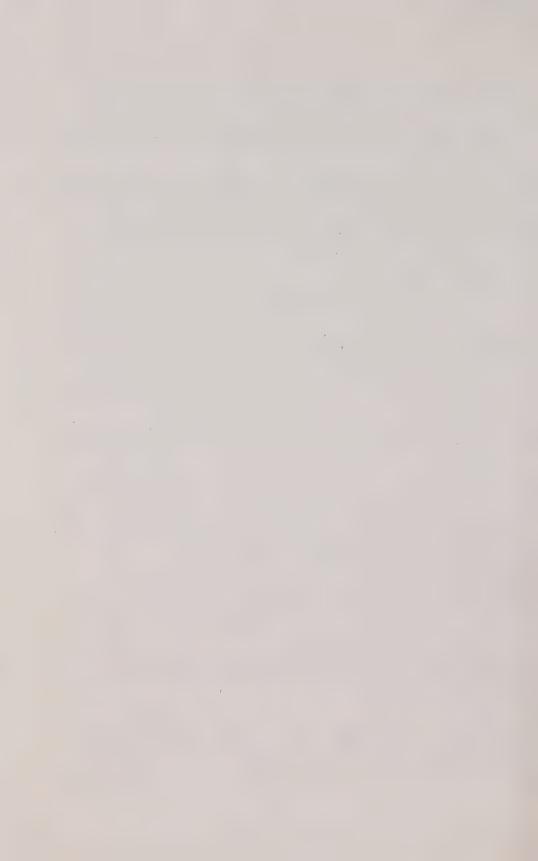
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# The Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services

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#### **Authors' Preface**

This study examines the role, if any, for commercial exchange arrangements with respect to the new reproductive technologies and use of reproductive materials. The moral and legal issues that arise in this field are extremely complex and contentious, and even more so if a role is to be contemplated for commercialization (or "commodification") of the technologies or materials involved. As four independent-minded individuals, we obviously do not share completely a common set of views about the world at large, or about this field in particular. However, we have done our best to set out opposing arguments fully and fairly, to sympathetically engage perspectives that may be at variance with our own, and to struggle toward some consensus on appropriate legal and regulatory regimes to govern this field of activity.

While we present a single set of proposals, we should acknowledge that each of us does not feel the same intensity of commitment to every element of the proposals. In particular, assuming commercial relationships are to be permitted at all, the central question of the scale of

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payments for reproductive materials or services, and the degree to which these payments should be contractually determined, as opposed to legally prescribed, is an issue that engenders some differences of opinion. Perhaps predictably, the male member of our team, and, highly predictably, the law and economics member of the team, is less convinced than his co-authors of the need for as stringent a set of constraints as the latter believe are warranted. However, the arguments on both sides of this issue are fully canvassed, and our proposals are best read as consensus, rather than unanimous, recommendations.

#### **Executive Summary**

This study examines the case for and against commercializing (or "commodifying") reproductive materials and services. The study identifies three basic scenarios where commercial exchange relationships may be possible: (1) exchange of gametes and pre-embryos; (2) exchange of gestational services; and (3) exchange of fetal material. It also indicates the major parties of interest, or "stakeholders," in these scenarios, employing a supply-demand-third-party framework.

The study proceeds to sketch the major normative perspectives that shape the contours of the debate over the commercialization of reproductive materials and services. These perspectives are grouped into three major categories: liberal theories, essentialist theories, and radical contingency theories.

Liberal theories include classical autonomy theories, utilitarian-efficiency theories, and distributive justice theories. This category is also committed to methodological individualism and to assigning special weight to the right of individuals to choose according to their own conceptions of the good and their own life plans. With important qualifications, liberal theories are more likely to be positively disposed to permitting a broad domain for exchanges of reproductive materials and services than are the other two major classes of theories.

Essentialist theories include religious theories, natural law theories, and conservative communitarian theories. While there are important differences amongst the various essentialist theories, in general they are hostile, or at least circumspect, to permitting a broad domain for the new reproductive technologies and a fortiori (therefore) for commercializing or commodifying them if this would increase the level of activities entailed. Essentialist theories share the concept that there is an essence to human nature, or a core set of community values, that may be threatened by the non-holistic conception of the reproductive process often claimed to be entailed in the new reproductive technologies.

Radical contingency theories typically reject the methodological individualism that is central to liberal theories and the moral absolutism often associated with essentialist theories. Furthermore, these theories view many or most individual preferences as socially constructed, thus reflecting the contingencies of history, class, and economic, political, and social structures. Instead of asking how social institutions might be

designed to allow for individual preferences, radical contingency theories tend to ask the reverse question: how can social institutions, and opportunities for interaction through these institutions, be designed so as to best shape and direct individual preferences?

Feminist versions of radical contingency theories stress that the current subordinate status of many women reflects historical, political, economic, and social contingencies; until the inequalities associated with these contingencies are redressed, permitting a wide domain for the new reproductive technologies, and, even more so, the commercialization of them, may well perpetuate and reinforce traditional, subjugated roles of women as primarily childbearers and childrearers.

With these normative perspectives as a backdrop, the study then examines their implications for possible exchange relationships in the three basic scenarios that are the focus of the study: gametes and preembryos; gestational services; and fetal tissue.

Flowing from this analysis, the study attempts to derive four governing principles that reflect as much common ground as seems achievable among these various normative perspectives, while recognizing that complete reconciliation of them is impossible. These principles are:

- The Principle of Uniqueness emphasizes the sui generis (unique) moral character of reproductive material and services, and justifies a different and more constrained role for commercialization or for commodification than for contexts in which exchange relationships are viewed as legitimate.
- 2. The Principle of Enablement (Not Inducement) identifies a very constrained role for financial compensation with respect to exchange of reproductive materials and services. Compensation is viewed as a means of offsetting barriers to potential suppliers who might wish to supply reproductive materials or services for non-monetary or altruistic reasons, but are unable to do so because of financial circumstances. However, this principle does not permit a scale of compensation that would induce potential suppliers to engage in activities that might entail sacrificing or compromising deeply held moral beliefs antithetical to such participation.
- 3. The Principle of Constrained Choice addresses and constrains the factors that either suppliers or demanders may specify as pre-conditions for their interaction with each other, such as race, sex, or physical or intellectual attributes.
- 4. The Principle of Fair Access addresses the ability of individuals on the demand side to secure access to reproductive materials or services, without making this solely a function of willingness and ability to pay.

These four principles cumulatively are designed to reflect a strategy of "constrained commodification," where commercialization or

commodification, i.e., financial remuneration, is intended to play a relatively "neutral" role in the use of reproductive materials and services.

In the light of these four principles, the study concludes by sketching the elements of possible legal and regulatory regimes for the exchange of gametes and pre-embryos, gestational services, and fetal tissue.

#### Part 1. Introduction

The emergence, in recent years, of a wide range of new reproductive technologies, and the parallel emergence of new technologies for the use of fetal tissue¹ for non-reproductive purposes (such as therapeutic transplantation or research), has sparked massive ethical controversies. Many of these technologies raise issues as to the legitimate scope (if any) for genetic engineering. They may also imply radically transformed social relationships, and engage sharply divergent views as to whether they perpetuate and reinforce negative gender stereotypes regarding the role of women in contemporary society. This latter issue may be viewed from a number of different perspectives, including those of women using the technologies to address problems of infertility, women who may provide reproductive materials, and persons who hold strong beliefs about the effect of reproductive technologies on women as a group and on society as a whole.

As if these controversies were not intense enough, an additional level of controversy is introduced when one turns to the question of the possible range of mechanisms that might be adopted to induce the supply of reproductive materials, on the one hand, and to allocate them, with their associated technologies, to recipients, on the other hand. In particular, the question of whether there should be a role for market or exchange processes on either the supply or demand side implicates broader and long-standing debates over what resources or attributes should be "commodified"; or, put differently, what is the legitimate domain of the market? This is the primary focus of the present study.

Margaret Jane Radin, in a widely noted article, identifies a spectrum of views on this issue. At one end of the spectrum one might locate scholars such as Karl Marx who favoured universal non-commodification, while at the other end one might locate many classical liberals and neo-classical economists who would view all resources and attributes as, in principle, commodifiable (universal commodification). Ranged in between are a wide and rich variety of viewpoints that permit some resources and attributes to be commodified, but prohibit the commodification of other resources or attributes altogether. Yet another range of views would identify some set of resources or attributes with respect to which only partial commodification should be permitted, such that market exchanges would be allowed subject to substantial legal constraints. In

some cases, lines must be drawn between market and non-market domains. In other cases, the central question is the appropriate choice of legal and related constraints to confine, structure, and channel private exchange activities so as to realize whatever advantages markets hold in particular contexts while minimizing their most dysfunctional or objectionable features.

The terms of reference of our study require us to focus on the commodification dimension of controversies over the new reproductive technologies and the disposition of fetal material; accordingly, it is important to begin with a clear definition of "commodification." In its simplest form, this term implies the exchange of goods or services for money or similar benefit. It does not a priori (necessarily) imply any pejorative or other connotation. Those persons who believe that the mere alienation (transferability) of reproductive material or services, whether for remuneration or not, is objectionable in its own right will find commodification a fortiori (therefore) objectionable. Persons holding this view would draw a distinction between commodification and commercialization, equating the latter with alienation of goods or services coupled with remuneration, and defining the former more broadly as alienation even in the absence of remuneration. However, if we were to equate commodification with alienability more generally, we would be required to evaluate the desirability of the new reproductive technologies per se. This is not the primary focus of this study. In order to focus on the special or sui generis (unique) moral problems that are introduced by commercialization of relevant relationships or interactions. we are largely required to assume the existence, and potential for noncommercial utilization, of the underlying technologies. Accordingly, for present purposes, we will adopt the narrower definition of commodification. which will largely confine our study to an examination of exchanges in which remuneration is involved.

However, while we decline to equate commodification with alienability more generally, we must also acknowledge that the line between a focus on commodification and a discussion of the new reproductive technologies per se is not always clear and bright. A complete separation of these issues will not always be possible, due to the tendency of some normative perspectives (outlined in Part 3, below) to derive their objections to commodification from more general objections to the technologies per se. Also, since commodification is often introduced in order to bring about an increase in supply, the question "How much of this activity is desirable?" must be addressed: an increase in commodification is likely to bring with it an increase in technologies for gamete procurement, pre-embryo creation, and insemination and implantation, for example, which will have implications for the amount of social resources to be devoted to these activities. This will raise questions about the desirability of a proliferation of the technologies. Technologies that enable commodified and non-commodified reproductive materials, namely gametes and pre-embryos, to be stored also raise issues about the appropriate allocation of social resources to the technologies, and

a host of other issues with regard to "stockpiling" and disposition of these materials following eventualities such as disagreements, divorce, and death of the genetic "parents." Demand may also increase, as more people become aware of the applications of the new reproductive technologies. Accordingly, while this study will retain a focus on commodification, the above implications will also be recognized and addressed at appropriate points in the discussion.

Further definitions are in order. First, it seems helpful to distinguish between self-regarding and other-regarding uses of reproductive material or technologies, at least in the context of the commodification debate. By our definition, a transaction will involve commodification only if money or some similar benefit is given in exchange for reproductive materials. That is, when gametes are supplied by the partners and gestation is performed by the female party, with the resulting child to be kept by the partners, no commodification is involved even though a new reproductive technology may be employed. We have termed this use of the technology "self-regarding." Conversely, whenever "donor" gametes, pre-embryos, or gestational services are used, regardless of the technology entailed in their use, the potential for commodification (by our definition) exists. We term these situations "other-regarding." "Other" simply means that persons other than the recipient or recipients are contributing so that the technology may be employed.

It is important to note that self-regarding applications of the technologies may have other-regarding effects, as when a couple undergoing *in vitro* fertilization (IVF) procedures produces "spare" embryos or ova that potentially could be commodified. When distinctions are made between self-regarding (non-commodifying) and other-regarding (commodifying) applications of the technologies, this qualification must be kept in mind.

It is also important to keep in mind the different inducement effects that may be associated with payment for reproductive and fetal material:

- 1. The prospect of financial remuneration could induce the *creation* of material that would not otherwise have been created (so individuals desiring the remuneration will accept *de novo* [new] medical and psychological risks).
- 2. Offers of financial remuneration could induce individuals to part with material that was already created for other purposes (for example, a fetus from a natural pregnancy or "spare" pre-embryos from an IVF procedure). The risks involved in creating the material would already have been taken for other reasons. Two sub-categories of situations should be identified here:
  - (a) The supplier could have already intended to part with the material and have no other use for it (i.e., a woman planning an abortion who would part with the fetus regardless of

- whether financial remuneration were offered or not). Here, the additional risks involved in parting with the material would be taken in any event.
- (b) The supplier did not intend to part with the material before being confronted with the prospect of financial remuneration (i.e., the woman was planning to sustain the pregnancy; or she was planning to keep the spare embryos and try to implant them in a later cycle). In this situation, the supplier will have been induced to bear the risks of parting with the material, and to forego the risks and benefits of continuing with the original use she had in mind for the material (i.e., the risks of sustaining the pregnancy to term, or those associated with implantation of pre-embryos, and the benefits of potentially producing a child).

We also note, as background, controversies surrounding the issue of infertility. Some of these controversies are scientific, in that there appears to be no clear medical consensus on the incidence, causes, and, in some cases, cures for infertility. For example, while the number of people visiting fertility clinics in the United States has tripled over the last 20 years, and each year approximately 2.4 million couples seek medical help for infertility,<sup>3</sup> the scientific evidence apparently does not support the widely held perception that the incidence of infertility is increasing.<sup>4</sup> It would seem that in 35 percent of infertile couples the male partner is the sole factor, and in another 35 percent the female is the only factor. In a further 20 percent the couple is infertile, and in the remaining 10 percent the source of couple infertility cannot be explained.<sup>5</sup>

As to the causes of infertility, sexually transmitted diseases are a significant, but by no means sole, cause. Some causes of infertility are not known, and in many cases cures are not available. However, it bears noting that the definition of infertility, which in medical contexts is often defined as the inability to procreate naturally over a one-year period, is somewhat arbitrary, due to the fact that some couples are able to procreate naturally given a time period longer than one year.

Moreover, it can be argued that the concept of infertility, like other so-called disabilities, is not, and should not be, exclusively a medical issue. That is to say, the extent to which particular physical limitations are regarded as disabilities requiring or justifying medical responses is to some degree a matter of social construction. In other words, a society may collectively acknowledge that some causes of infertility can be prevented and some can be cured, and must determine whether or not some should be responded to through the new reproductive technologies, and whether some perhaps should, or must, be lived with. The question of the appropriate allocation of social resources to the prevention and treatment of the causes of infertility, and the potential use of new reproductive

technologies as a substitute for physiological "cures" for infertility, is clearly an important underlying issue in the commodification debate.

The organizational structure of our study is as follows.

In Part 2, we identify a range of possible exchange relationships pertaining to reproductive materials and services, and note the major stakeholders in each case. To focus the ensuing analysis, we conclude Part 2 by identifying three general categories of activities where the possibility of exchange relationships requires analysis: (1) exchange of gametes and preembryos; (2) the sale of gestational services (as in "surrogacy" contracts); and (3) the sale of fetal tissue or organs for therapeutic or research purposes.

In Part 3, we sketch a range of major normative perspectives that seem to drive debates over the appropriate scope and role for commercialization of the new reproductive technologies and uses of reproductive materials. In this section we identify three individualistically oriented liberal theories that seem to have particular salience to an evaluation of commodification in the context of commercial exchange relationships: these are autonomy theories, utilitarian/efficiency theories, and distributive justice theories. The unifying element of these theories is a common commitment to individual conceptions of the good. We then contrast these theories with theories that we group loosely under the heading of "essentialism." Essentialist theories share a belief that use of the new reproductive technologies and reproductive materials must be reconciled with an essence or core of either human nature, or community values, or both.

We then contrast liberal and essentialist theories with radical contingency theories. The latter view the contingencies of history, culture, society, politics, and economics as having combined to generate systemic inequalities for women that the new reproductive technologies and new uses of reproductive materials may exacerbate, at least if the inequalities are not first attended to. As we review these theories, we indicate the general nature of their contributions in the context of exchange relationships pertaining to reproductive materials and services, identify some of their strengths and weaknesses, and note major points of convergence and divergence among them.

In Part 4 we show in more detail how these various normative perspectives are likely to play themselves out in the three exchange scenarios identified in Part 2: exchange of gametes and pre-embryos, gestational services, and fetal material.

In Part 5, we develop four general principles: the Principle of Uniqueness, the Principle of Enablement (Not Inducement), the Principle of Constrained Choice, and the Principle of Fair Access. From our analysis in Parts 3 and 4, these principles seem to maximize the degrees of convergence that the normative perspectives are likely to yield, while recognizing that anything approaching complete reconciliation of such diverse perspectives is impossible.

Part 6 brings these governing principles to bear on the three categories of potential exchange scenarios identified in Part 2 and explores possible legal and regulatory frameworks that these principles seem to imply.

# Part 2. Possible Exchange Relationships

#### I Introduction

The purpose of this section is to provide a clear picture of the exchange relationships made possible by the new reproductive technologies. Our particular task is to examine exchanges, rather than the technologies per se. However, it is important to summarize the basic information on which we rely. The questions of who will assume risks, provide compensation for risks that materialize, bear the "cost" of the use of various technologies and fetal material for the purpose of exchange, and receive the "benefits" of such use are central to our legal analysis, as is the identification of parties with the potential to be involved in any exchange relationship. In short, we need to set out our understanding of what the risks, costs, and benefits are, and who the parties are, before examining what we would do about them.

Another issue that must be addressed is the reasoning behind our adoption of supplier-demander-third-party taxonomy (classification system). Our identification of these parties has two purposes: (1) to make distinctions among the exchanges of reproductive and fetal material on the basis of which party's interests would be implicated should such exchanges be permitted; and (2) to identify commonalities among the exchanges on the basis of the types of exchange relationships that would be involved. The best way to achieve these two goals is to arrange the parties into groups according to their relationship to the material and to each other in the context of the transaction: that is, whether they are on the supply side or the demand side, or whether they are third parties. We are aware that some persons might approach the problem differently because they object to distinguishing among suppliers, demanders, and third parties; 6 others might argue that there is a lack of consensus about which interests to place in each of the three categories. While we are sensitive to these concerns, we remain convinced that the supplier-demander-third-party taxonomy is appropriate, given that our mandate is to examine possible exchange relationships.

An additional point should be noted. While we have referred to suppliers and demanders as though people must be one or the other, it is possible for some people to be both: that is, it is possible to buy with the intention of reselling the materials (what we term a "second-order" exchange). Interests that could be involved in these types of transactions would include research interests, such as private industry (e.g., pharmaceutical or fetal tissue processing companies), private research

foundations, universities and hospitals, other government-funded research organizations, foreign interests, and researchers under contract to any of the above. Medical agencies, including fertility and abortion clinics, cryopreservation and hospital facilities, individual doctors, brokers, agents, and coordinating agencies, could also be involved. Society itself can also be thought of as a "demander," since society is presumably interested in the advancement of biological knowledge, the avoidance and treatment of disease, and the production of children. Because these interests — society, research, and medical agencies — are common to every technology (with the exception of artificial insemination by husband [AIH] and other applications that do not require donor material) and to the exchange of fetal material, they will not be listed individually below.

We begin, then, with our definition of each new reproductive technology (NRT) and our understanding of research and therapeutic activities using embryonic and fetal material, summarizing the risks, costs, and benefits of each. We then identify parties on the supply and demand sides. Third-party interests, which are common to exchanges of both fetal tissue and technologies, are discussed together. Finally, we set out three basic scenarios where exchange of reproductive material and fetal tissue could take place. These form the focus of analysis in succeeding sections.

#### II Procedures and Parties

## (A) The Technologies<sup>8</sup>

In this section we explain the parties (suppliers and demanders) and procedures (including some risks, costs, and benefits) involved with each technology.

# (a) Artificial Insemination by Husband (AIH)9

AIH involves injecting a quantity of the husband's fresh or previously frozen semen into the vagina of his spouse at the time of ovulation. An alternate technique involves injecting sperm directly into the uterus. Fertilization occurs naturally in a fallopian tube, and gestation proceeds entirely within the body of the genetic/gestational/social mother. This technique is the most similar to the natural method of conception, posing minimal risk to the woman and requiring little technical expertise. Since the partners here are joint suppliers and demanders, the supply/demand distinction is not appropriate. (One can hardly imagine an exchange whereby a wife pays her husband for his sperm and a husband pays his wife for her ovum to create their child.)

## (b) Donor Insemination (DI)

The procedure for DI is the same as that for AIH. Sperm is supplied by a donor, who frequently is not known to the woman who will be the genetic/gestational/social mother. Advantages associated with the use of DI are the same as those for AIH, with two key additional benefits: couples whose infertility is due to a male factor may have a child genetically related

to the female partner, and women who do not wish male involvement (e.g., single and lesbian women) are able to have genetically related children without a male partner. For some, DI is a solution to long adoption waiting lists, and offers the prospect of control over the child's genetic heritage and the uterine environment (e.g., proper nutrition, lack of substance abuse, etc.). 2

A key risk associated with DI is the concern that acquired immunodeficiency syndrome (AIDS) or other infectious diseases will be transmitted by the donor. Although donors may be required to undergo physiological or blood tests in addition to genetic screening, tests may not reveal the presence of human immunodeficiency virus (HIV) antibodies in the donor's blood until months after he was capable of transmitting the virus in his semen. Freezing sperm and testing the donor at a later time may be one solution; setting standards for donor screening and testing would also be important.

There are certain costs associated with DI, although these are substantially smaller than the costs of other procedures. "Donors" are currently paid, and the combination of a donor's fee, "screening and processing costs, a doctor's time, and perhaps several inseminations over a period of months could be prohibitive for some demanders. There could also be psychological risks for the supplier (e.g., subsequent regret, or desire for information about the child). Partners of women who receive donor sperm might risk psychological difficulties in accepting the child as "theirs." 16

#### (c) Ovum Donation

Ovum donation enables women who are unable to produce viable ova to conceive and gestate, using sperm from a partner or donor/supplier. The procedure involves removing ova from one woman (the supplier) and using the ova in conjunction with one of the technologies described below, such that gestation occurs in the body of another woman, who will be the gestational/social mother. Suppliers could be women who are already undergoing ova collection procedures as part of their own fertility enhancement program, or women who volunteer to undergo ovulation induction purely for the purpose of donating *de novo*. In future, it may also be feasible to supply ova from removed ovarian tissue, and to store ova (perhaps by cryopreservation).

Risks for the supplier arise from use of superovulatory drugs, and from the retrieval procedure. The demander may incur some risks and discomfort as a result of the medication necessary to prepare her uterus to sustain the fertilized ovum. There could also be psychological risks for the supplier, as in sperm donation. There is also an additional possibility: the supplier could discover that the demander has given birth to a child using her ova, while she herself is unable to sustain a pregnancy. 19

#### (d) Gamete Intrafallopian Transfer (GIFT)

GIFT involves the injection of sperm directly into the fallopian tube, where fertilization takes place. The ovum could be supplied by the genetic/gestational/social mother, or by a donor (in such a case the donor/supplier is the genetic mother, and the recipient/demander is the gestational/social mother). GIFT could be either self- or other-regarding (either donor sperm and/or ova, or the couple's own materials could be used).

Risks, and some discomfort, are associated with techniques to remove ova and to place ova and sperm in the fallopian tube. Also, GIFT is more technologically complex and requires more medical involvement than DI or AIH. Also, the rate of spontaneous abortion after GIFT would appear to be higher than that in the general population.<sup>20</sup> One advantage of GIFT might be a higher likelihood of implantation relative to IVF (see below), due to the use of the fallopian tube to time the release of the fertilized ovum into the uterus.<sup>21</sup>

## (e) In Vitro Fertilization (IVF)

IVF involves extracorporeal fertilization, and thus enables examination of the zygote prior to implantation. This may be advantageous because it is possible to determine whether fertilization has taken place, and to ascertain whether the zygote is likely to be viable before implantation.<sup>22</sup> Donor sperm and/or ova could be used, or the procedure could be self-regarding. Risks associated with ovulation induction and ova retrieval are involved, as are psychological risks if donor material is used (see DI and Ovum Donation, above). The introduction of several pre-embryos<sup>23</sup> into the uterus may increase the risk of a multiple pregnancy.<sup>24</sup> A significant amount of time and expense is involved for medical personnel and women demanders, particularly for the administration of the required medication and tests, and the use of a clinic or hospital. IVF requires considerably more technical expertise than DI, for example.

## (f) Zygote Intrafallopian Transfer (ZIFT)

ZIFT involves the insertion of a zygote into the fallopian tube. This technique uses the fallopian tube to time the zygote's release into the uterus, such that the likelihood of implantation is increased relative to that of techniques that insert pre-embryos directly into the uterus.<sup>25</sup> ZIFT may take place following IVF (above), and would therefore involve the same procedures and parties.

## (g) Pre-Embryo Donation

Sperm and ova donations involve provision of gametes, but pre-embryo donation involves the supply of an ovum that has already been fertilized. By definition, it is other-regarding: the gestational/social mother (alone or with her partner) is the demander of a pre-embryo supplied by other persons. These suppliers could be individual gamete donors, or persons who have "spare" pre-embryos after using IVF.<sup>26</sup> Pre-embryo donation entails the advantages, disadvantages, and parties of IVF (above), and those

associated with use of donor materials (see DI and Ovum Donation, above). An advantage for demanders (over adoption) may be the ability to control the gestational environment, and to experience giving birth.

## (h) Pre-Embryo Gestation and Transfer

Pre-embryo gestation and transfer requires one woman to gestate a pre-embryo provided by another person, and to surrender the child after its birth to that other person. The woman who gestates the pre-embryo is the supplier (supplying gestational services)<sup>27</sup> and the person who provides the pre-embryo and receives the resulting child is the demander. The demander bears the risks associated with ovulation induction and ova retrieval, and the supplier bears risks associated with medication to prepare the uterus to sustain the pregnancy, the physical risks of pregnancy, and the psychological risks involved in surrendering the baby after birth. Risks connected with the use of donor materials may also be relevant, if these materials are used to create the pre-embryo.

Pre-embryo gestation and transfer permits a woman (a demander) who is unable to gestate a pre-embryo to have a child that may be genetically related to herself (and perhaps also to her partner). It may be quite costly due to the expense involved in producing the pre-embryo (see IVF, above), the cost of a "broker" or other intermediary, and the fee paid to the woman providing the gestational services.<sup>28</sup> A key issue is the controversy about using a woman as a gestational surrogate: as discussed later in this study, the purchase and sale of gestational services pose moral problems for a number of people.

## (i) Preconception Agreements (PCAs) ("Surrogacy")

We have distinguished between pre-embryo gestation and transfer and preconception agreements on the grounds that the "surrogate" in the former makes no genetic contribution, while the "surrogate" in the latter provides her own ova in addition to gestational services. Either situation may involve a contract between the "surrogate" and the demander; the key distinction is that the supplier in a PCA is both the genetic and the gestational mother of the resulting child. The moral significance attributable to this distinction is controversial.

In a preconception agreement, the supplier's ovum may be fertilized and implanted using IVF, GIFT, ZIFT, or artificial insemination. The supplier bears all risks associated with these technologies, and the physical risks of infectious diseases, etc., associated with use of sperm, in addition to the psychological risks involved in surrendering the child after birth. The demander bears no physical risk (we assume that the provision of sperm by a male demander is not physically harmful). Psychological risks for the demander could arise if the sperm used was initially procured by the demander from a sperm donor. A demander might also bear some psychological risk with regard to accepting a child that is not genetically or

gestationally related to her. It seems quite clear, nevertheless, that the vast majority of physical and psychological risks are borne by the supplier.

PCAs create one additional possibility: a PCA would enable homosexual men (and heterosexual men who do not have partners able or willing to gestate a child) to become genetic and social parents. PCAs and pre-embryo gestation and transfer agreements are the only ways that such men can have genetically related children.

## (B) Research and Therapy: Gametes, the Pre-Implantation Concepti ("Pre-Embryos"), and Embryos/Fetal Material

Here we identify the parties who could potentially be involved in exchanges of gametes and pre-embryos, and embryos/fetal material for research and reproductive purposes. We note major purposes that certain of these materials can serve, and outline certain risks and costs involved in methods of procuring the material. We do not address "self-regarding" applications of the reproductive use of materials, such as extracorporeal manipulation of a couple's own pre-embryo prior to implantation in the female partner, because self-regarding applications, by our definition, do not involve commercial exchanges or "commodification." Each of the materials addressed below could have been obtained from donors in either a "de novo" or a "spares" situation. Research and medical interests would be demanders in both situations below.

## (a) Gametes and Pre-Embryos

Gametes may be used for research into the process of fertilization, and ova in particular may be used for studies on methods of cryopreservation. Pre-embryos may be used for the acquisition of information about processes and favourable conditions for embryonic development, and may be tested for genetic defects. Gametes and pre-embryos can also be used for research into the human genome.

Gamete suppliers would be male and female donors, and suppliers of pre-embryos would be couples or individuals who had already made use of donated gametes to produce a pre-embryo. Women who had become pregnant through natural means could also supply a pre-embryo through use of uterine lavage. Pre-embryos supplied after *de novo* procedures would be more likely to be "normal" than those supplied as spares, since persons who produce spares as part of their own attempt to conceive are likely to use the most healthy and viable pre-embryos themselves, and donate the less healthy or viable abnormal ones.<sup>29</sup> Both ovulation induction and ova retrieval procedures carry some medical risk and cause some discomfort to the women involved. Uterine lavage also carries some medical risk.

## (b) Fetal Material

Fetal material is used in a number of research activities, from the culturing of cell lines to highly experimental treatments for certain diseases (e.g., Parkinson's disease and Alzheimer's disease). Use of fetal tissue is

advantageous because this material is less immunologically reactive, grows faster, has a greater capacity to develop, and is more adaptable than adult tissue.<sup>30</sup> Other uses of fetal material include the testing of drugs (and cosmetics) for human use, and transplant attempts have been made using the organs of older fetuses.

Fetal material may be obtained (though rarely) through spontaneous abortions (miscarriages), and is also obtained through removal of ectopic pregnancies and therapeutic and elective abortion. Tissue from spontaneous abortions may not be suitable for transplantation because of the likelihood of fetal defects, and since miscarriages generally occur outside of a clinical setting tissue retrieval is difficult, if not impossible. Obtaining tissue from aborted fetuses may also be problematic, since some extraction methods — suction techniques used during first trimester abortions in particular — may damage the materials such that their medical and research usefulness is compromised. Nonetheless, fetal cells obtained from first trimester abortions may still be usable for neural transplantation.

De novo suppliers would be women who became pregnant (through use of donor sperm, AIH, or intercourse) expressly to supply the fetal material. The analogy to a supplier of "spares" would be a woman who was anticipating having an abortion in any event, and decided to supply the material for research or therapeutic purposes. Abortion can involve both medical and psychological risks for the woman, and some abortion techniques that preserve more of the fetal material may carry greater risks to the woman.<sup>35</sup>

In addition to medical and research interests, it is possible that some patients and their families and friends would be demanders of fetal material. Hospitals and abortion clinics could become "second order" suppliers, selling abandoned material or material purchased from female patients.

## (C) Third Parties to the Exchange of Reproductive and Embryo/Fetal Material

## (a) Classes of Third Parties

We have chosen to arrange third parties into groups. In this section, for the most part, we merely identify the parties who have an interest in the exchange; the nature of their interest (their "stake" in the transaction) is examined in more detail later in this study. Every use of reproductive material (including fetal material) has implications for all of the groups that we identify; however, certain of the technologies have an impact on significantly more members of each group than do other technologies or uses of fetal material. We begin by setting out the groups and identifying their members, and then proceed to distinguish the technologies that have implications for the largest numbers of third parties.

The first group might be termed "family interests." It includes the partners (homosexual or heterosexual) and already-born children of donors

and recipients. Friends and members of the extended family are also included.

A second category includes the fetus or child resulting from the use of the technology in question. The topic of fetal "interests" is highly controversial, but it would seem that, at a minimum, a fetus is entitled to some measure of respect by virtue of its having had the potential to become a human being. This issue is discussed at some length later in this study. It is clear that other parties must take the fetus's or child's interests into consideration, since the fetus or child is the subject rather than a participant in an exchange transaction. Future sexual partners of children created using donor gametes (i.e., partners who might possibly have also been created by gametes from the same donor) also fall into this category.

A third group comprises those responsible for selecting, manipulating, and storing reproductive material. This group, which might be called "facilitating parties," includes the doctors of the supplier and demander (who are responsible for the health and best interests of the parties), and medical personnel who arrange for production of the reproductive or fetal material (i.e., through combining gametes, choosing which pre-embryos to implant, performing abortions, etc.). Technicians and operators of facilities that transport and store reproductive and fetal material are included in this category. For-profit processing companies (which process the tissue to decrease the possibility of rejection by the recipient, and isolate and cause cells to proliferate so that small amounts of fetal tissue can be used for many patients)<sup>36</sup> are also placed in this category.

The fourth group is composed of what may be called "moral interests." Its membership includes individuals and associations that have beliefs about how reproductive material and fetal material ought to be used in our society. Some "moral interests" have a position on activities related to the technologies and use of fetal material (e.g., masturbation, abortion, manipulation of extracorporeal gametes and pre-embryos, etc.).

(b) Variations Among Technologies in the Number of Third Parties Involved It will be apparent that certain of the technologies are likely to involve and concern a significant proportion of the membership of all of the groups. While even AIH (which is a technology with no implications for commodification) affects all four groups, only a few members of each group (such as, for example, the Catholic Church) would be concerned. But technologies with two particular elements — donor materials and the IVF technique, used separately or in conjunction with one another — are likely to involve a great many third parties. For instance, when donor gestational services are a part of the technology, the individuals and groups that could be involved include: the gestational mother's partner and children; those who commission the services; moral interests; medical personnel and doctors; and the child. The number of affected parties would be far in excess of those affected by a non-donor technique such as AIH. Some donor techniques involve more third parties than others: donor gestational

services will involve more interests than DI, for example. Where the IVF technique is employed, especially with donor gametes, many third parties (such as moral interests who are concerned about the use of donor materials and the creation and disposal of "spare" pre-embryos, and many of the members of the "facilitating parties" group) will be involved. A technique such as GIFT — which does not involve extracorporeal fertilization — would likely affect fewer third parties than the technologies that use IVF. Pre-embryo gestation and transfer would, arguably, affect the largest number of third parties, since presumably both IVF and donor gestational services (and possibly donor gametes) would be involved.

## III The Three Exchange Scenarios

As we have indicated, there are significant differences among the technologies and uses of fetal material in terms of the risks, costs and benefits, parties and interests associated with each. It is also clear that there are certain common elements, particularly with regard to the type of material or service that could be exchanged. Grouping the suppliers and demanders identified above on this basis yields three possible exchange scenarios: exchange of gametes and pre-embryos, gestational services, and embryos/fetal material. Organizing the interactions between suppliers and demanders into these three groups enables us to focus our later analysis on the implications of possible commercial exchanges rather than on the technologies per se.

## (A) Preliminary Qualifications

Since the three scenarios integrate the discussion in Sections A (The Technologies) and B (Research and Therapy) above, some summarizing and repetition are necessary. Other miscellaneous qualifications must also be noted at this point. First, we attempt to reduce the overlap of the scenarios by considering the technologies in their "pure" form, wherever possible (for example, GIFT could be used in conjunction with a PCA but, for our purposes, parties involved in GIFT are grouped in the gametes exchange, while persons involved in PCAs are placed in the gestational services scenario). Second, we again use the terms "medical agencies" and "research interests," which were defined above. Brokers from the "medical agencies" category could act as intermediaries or agents in any of the exchange scenarios. Finally, it is important to recall that some members of every group of third parties (see above) will be implicated in all three exchange scenarios.

## (B) The Three Exchanges

## (a) Exchange of Fetal Material

The first possible scenario involves the sale of embryonic and fetal material (including but not limited to tissue and organs). This material could be sold for therapeutic or research purposes, and demanders would be medical agencies, research interests, and persons who want fetal

material for the treatment of their own medical condition. Suppliers would include pregnant women who are planning to undergo an abortion, or who could be induced to abort because of the prospect of a financial reward, and women who would become pregnant in order to abort for financial reward. Demanders could potentially increase the financial reward to persuade women to gestate the fetus to a particularly desirable stage (i.e., if fetal organs were needed, assuming no legislative restrictions, then theoretically a woman could be paid to gestate the fetus to a very late stage of development to ensure the organs were as mature as possible).

## (b) Exchange of Gametes and Pre-Embryos

In this scenario, sperm, ova, or pre-embryos could be sold to persons wishing to produce a child through use of a new reproductive technology, or to produce an embryo or fetus for research or therapeutic purposes (which would involve a second-order exchange). Gametes per se could be used for research, as could a pre-embryo, embryo, or fetus created by the combination of purchased gametes. Suppliers would be men and women (or one or the other, following gamete donation) who had either spare gametes or pre-embryos from endeavours to achieve their own pregnancy, or who produced the gametes or pre-embryos solely for sale. Demanders would include medical agencies, research interests, and individuals and couples who want gametes so that they can use one of the new reproductive technologies to create a child for themselves or to produce a pre-embryo, embryo, or fetus to sell to medical agencies or research interests.

## (c) Exchange of Gestational Services

In this scenario, gestational services could be sold to produce a child or to gestate an embryo or fetus for sale. Demanders would be individuals or couples who want the child or who want to sell the embryo or fetus to research interests. In a free market, it would be possible for research interests to also contract directly with suppliers, or induce suppliers to breach contracts with demanders by offering a financial incentive (i.e., a higher price than that offered by the original demander). Suppliers would be women who are capable of gestating (using either their own genetic material or material from a gamete donor or demander).

### **IV** Conclusion

These three exchange scenarios form the basis for our later analysis of regulatory goals and proposals. As such, they are revisited at length in Part 4. Therefore, we temporarily set them aside as we turn to a consideration of the major normative perspectives that provide the framework for the remainder of this study.

# Part 3. The Major Normative Perspectives: Sketching the Contours of the Debate

#### I Introduction

In clarifying the nature of the normative conflicts over the commercialization of reproductive materials, and in order to identify possible policy options that narrow the nature and extent of the divergences among competing normative perspectives, we think it is useful to develop a basic taxonomy of these perspectives (even at the risk of over-simplification) to illuminate the general orientation of these perspectives toward the phenomena of concern to us. Apart from the risk of over-simplification, we also recognize that there is a risk that some perspectives or viewpoints might not fit neatly into the categories that we present below, but reflect instead a more nuanced combination of more than one perspective. However, given the controversy surrounding the new reproductive technologies, clear normative signposts are needed before embarking upon an analysis of the possible policy options relating to the major categories of these technologies. Otherwise, we run the even greater risk of disappearing into a moral swamp where an appreciation of reasoned alternative positions becomes impossible and where debates are reduced to voices shouting incomprehensibly at each other across unfathomable moral voids.

The theories discussed in this section are more fully developed and applied in our later analysis of the three major categories of reproductive activities: gamete and pre-embryo transfers, gestational services, and fetal tissue. We begin with a review of three liberal theories that share a form of methodological individualism that accords special weight to individual

conceptions and choices as to the good life.

#### II Liberal Theories

## (A) Classical Autonomy Theories

For classical liberals, individuals are conceptualized as having preceded the existence of civil society. Outside of society these individuals are thought to have run the risk of mutually destructive forms of anarchy. Hobbes, Locke, and later liberals postulated the emergence of civil society as a form of social contract where individuals actually, tacitly, or hypothetically consented to surrender some measure of individual autonomy to the state in return for guarantees of protection for justly acquired forms of private property and the ability to enter into consensual relations pertaining to these property rights with other members of the society. Just as the overarching social contract was conceived of as a form of "government with the consent of the governed," from whence it derived its legitimacy, individual actual contracts were seen as a manifestation of government with the consent of the governed.

A central tenet of classical liberalism has always been that the state should remain neutral among competing conceptions of the good life, which individuals should be free to choose for themselves in charting out their own lives and their relations with others; and that the right and responsibility of individual moral choice have overriding moral force in themselves — a deontological theory of autonomy that abstracts from external judgments about the rightness or wrongness of individual choices. In this conception of the limited state, a strong distinction is drawn between public and private spheres, and a central role is assigned to private property rights and private ordering through freedom of contract.<sup>37</sup>

There are a number of difficulties with classical autonomy theories that have a direct relevance to the new reproductive technology context:

First, does the conception of private property rights extend to an individual's own body or parts or aspects thereof? For Locke, private property rights start with one's own body. These rights are then projected into the external world through just acquisition of external objects. However, even John Stuart Mill, a celebrated proponent of classical liberal values, in a well-known example in his essay *On Liberty*, <sup>38</sup> doubted whether people should be permitted to sell themselves into slavery. According to Mill, a person is not free to agree not to be free.

Second, with autonomy theories there are serious difficulties in determining whether the initial acquisition of property rights was just and, if not, what rectifications are required to redress initial unjust acquisitions. In a contemporary setting, this translates into a concern about the implications of gross inequalities in endowments that individuals bring to their interactions with each other.  $^{40}$ 

Third, there is a problem of determining whether all preferences have equal validity. Autonomy theories essentially take preferences as given and are not concerned to inquire whether some preferences are more genuine or worthy than others. Indeed, where preferences come from and how they are shaped and reshaped over time, and the legitimacy of the sources that shape and reshape them, are of little or no concern to classical autonomy theorists.

Fourth, with respect to the central role played by freedom of alienation or contract in these theories, autonomy theorists themselves recognize that, for a decision to transfer property rights by contract or donation to be regarded as autonomous, certain conditions must be met:

1. The decision must be voluntary, i.e., uncoerced. A very large body of complex and controversial philosophical literature has developed around the issue of coercion.<sup>41</sup> A distinction that is central in much of this literature is that between threats and offers. A contract that is entered into in response to an offer is viewed as uncoerced, while a contract entered into in response to a threat is regarded as coerced. An offer is defined as a proposal that increases the possibilities open to the other party, while a

threat reduces these possibilities. However, in deciding whether a proposal increases or decreases the possibilities open to the other party, autonomy proponents have been compelled to acknowledge that in identifying the reference point against which the proposal is to be evaluated, it is impossible to avoid (in many contexts) a stipulation of the offeree's moral baseline from which a proposal may move him or her up or down. In identifying the offeree's moral baseline, one is quickly drawn outside the contractual domain into a highly contentious debate about pre-existing moral and legal rights.

- 2. The decision must be adequately informed. However, again, while some cases are easy, many other cases are highly problematic. Very few individuals enter into contracts with perfect information about the current or future state of affairs as it may bear on the value of the contract or interaction to themselves. Of course, one can argue that the decision to forego the opportunity of acquiring further information is itself an autonomous decision; but if the condition of informed consent is to retain any salience, there will be a wide range of other cases where an individual choice may reasonably be regarded as defective (non-autonomous) because it was made in the absence of highly material information. 42
- 3. Even if the immediate parties to contractual arrangements are acting voluntarily and with full information, the transaction may impact negatively on one or more third parties, thus violating their autonomy. This is often referred to as the "harm" principle, which was first enunciated in these terms by John Stuart Mill. 43 Mill appears to have assumed that determining whether actions by A alone, or by A and B in association with each other, harm third parties was a matter of relatively mechanistic determination. However, again, an extremely complex body of philosophical literature has developed around the harm principle, which is now widely understood to be heavily and unavoidably moralized.44 That is to say, one could give the harm principle so expansive an interpretation that the private ordering regime would largely come to an end, simply because somebody out there in society happens to take offence at the activities of A alone, or A in association with B. On the other hand, to define harm to third parties as entailing only direct forms of infliction of physical injury is to adopt an arbitrary and unprincipled definition of harm that assigns special significance to physical impacts on bodily integrity or private property, without explaining why these impacts should be viewed as more serious than any of a number of less tangible impacts.

Autonomy theories and their limitations are central to debates over commercialization of reproductive materials. On one hand, it can be argued that consensual transactions for the sale and purchase of reproductive material that reflect individual autonomous choices are private to the parties involved and do not implicate any state or public interest. On the other hand, it can reasonably be argued that many of the general difficulties presented by autonomy theories are acutely striking in the present context, e.g., Mill's slavery concern can arguably be extrapolated to the sale of reproductive materials and faculties.

It can also be argued that the preferences of parties entering into these arrangements should not be taken as given: in many cases, these preferences may have been shaped by long histories of subordination of women by men, or by more general socialization processes that have sanctified the role of women as childbearers, and depicted men as pre-occupied with perpetuating their genetic lineages — a position put forward by Mill himself in his essay, *The Subjection of Women.*<sup>45</sup>

Another argument that might be raised is that inequalities in prior endowments, at least where they reflect injustice in initial acquisition, may prejudice the ability of individuals on the demand side to enter into transactions for the acquisition of reproductive material. inequalities on the supply side may compel individuals lacking alternative sources of income or wealth to sell reproductive materials or services. It can be said that many such transactions may entail coercion, in part because of inequalities of wealth, but also due to factors such as pressures from friends and relatives, or more general social pressures. It might well be that many such transactions, because they may entail complex, risky, and intrusive medical procedures, as well as a number of psychological risks, will rarely be made with full information as to their implications. Finally, it can be argued that whatever the nature of the interaction between immediate suppliers and demanders, harm to third parties will often result; for example, the welfare of a fetus or baby may be prejudiced. other family relationships imperilled, or significant segments of the community-at-large offended.

Despite the complexities of these arguments for and against the role of autonomy values in the reproductive context, some contemporary analysts strongly subscribe to assigning a central role to such values in this context. For example, John Robertson argues that the state has no right to constrain private arrangements between individuals with respect to the exchange of genetic material, or even the use of medical procedures to screen reproductive material for gender, genetic, or other characteristics.<sup>46</sup>

Some liberal feminists take a similar view.<sup>47</sup> Indeed, the feminist movement has invoked autonomy values to strongly attack state restrictions on contraception, and to advance the claim for unconstrained access to abortion, where epithets like "pro-choice" or "hands off my body" have evoked classical liberal sentiments. In the reproductive technology context,

liberal feminists argue that to be consistent with positions they have taken on issues such as contraception and abortion, they should similarly defend the right of individuals, including women, to make whatever private decisions they find appropriate with respect to their bodies and to the use of these technologies. In addition, the argument is sometimes made that these technologies provide the potential for liberating women from subordination by men by permitting the possibility of childbirth and childrearing, e.g., by lesbian or single women, without requiring relationships with men. Moreover, it is argued that to prohibit women from demanding payment for reproductive services or materials is to sanctify traditional and oppressive notions of women as limited to the altruistic roles of childrearers and caregivers and is argued to be tantamount to "moralized slavery."

#### (B) Utilitarian/Efficiency Theories

Unlike the limited role assigned to the state in most autonomy theories, utilitarian theories contemplate a larger role for the state in constraining, shaping, or directing the activities of individual members, if only to solve coordination or collective action problems that individual actors may confront. Unlike deontological theories of autonomy, utilitarian theories are end-state or consequentialist in nature. According to early utilitarians, such as Jeremy Bentham, the state is justified in adopting collective policies that increase the total or at least the average utility of members of the society in question. Here, utility is conceived of in subjective terms — pleasures or pains felt by individuals. The state is entitled to engage in a society-wide calculation of these pleasures and pains with regard to policy choices in order to secure a net increase in average utility in society — even though the distribution of utility associated with these policies may be quite uneven and, for some individuals, negative. In other words, in sharp contrast to classical liberal or autonomy theories, the state is entitled to sacrifice the welfare of some if this would more than proportionately increase the welfare of others.

As with autonomy theories, a number of standard difficulties present themselves. Some of these difficulties are conceptual, while others are methodological or operational. At a conceptual level, the principal objection to utilitarianism is that, while it counts every individual's utilities and treats them as of equal validity, it permits the use of some individuals as a means to the ends of others, thus violating the conception of equal moral agency that underlies classical liberal theories. For example, a sexist, racist, or homophobic society might be able to justify policies imposing its values on particular minorities if these values could plausibly be regarded as increasing average utility. Conversely, however, to the extent that a minority of members of society were sexist, racist, or homophobic in their private interactions, and the majority of members of society were opposed to these values, a utilitarian calculus might well justify the imposition of legal constraints on the minority of members espousing these values.

At a methodological or operational level, utilitarianism, in many contexts, presents almost insuperable problems of indeterminacy. For example, in the reproductive technology context, all the utilities and disutilities of every member of society who is affected, directly or indirectly, by these activities would have to be weighed. These would include infertile couples and their families on the demand side; providers of reproductive material and their families on the supply side; medical and research interests; and third parties generally who may have widely divergent views as to the appropriateness of this activity.

How all of these utility effects can, in practice, be uncovered, measured, and compared is far from obvious; the only possibility would seem to be a retreat to a kind of majoritarianism, whereby these issues would simply be resolved by popular citizen vote or a free majority vote of representatives in the relevant legislature. However, the likelihood of such a vote accurately revealing underlying utility functions and intensity of preferences seems remote. Indeed, much of the uncertainty in debates over the new reproductive technologies would seem to derive from the fact that any number of more or less plausible scenarios as to the possible impact of these technologies on a wide range of groups in society can be advanced, with little or no prospect of empirical validation of the claimed impacts.

At this juncture it is important to note two economic derivatives of utilitarian theories, both of which involve a particular conception of efficiency. 51 The narrower and more stringent concept of efficiency is *Pareto* efficiency. This entails asking of any particular transaction or policy option, "Is it likely to make somebody better off and nobody worse off?," using the parties' current state of affairs as the baseline. The ethical intuition behind this concept is that no reasonable person could find objection to a transaction or policy that meets this test, except for unworthy reasons such as envy. The conventional economic argument regarding private exchanges is that two parties would not be likely to enter into such an exchange unless they both expected to be made better off by it. As these transactions generalize across the economy, and as markets develop, the price mechanism serves two allocative functions: on the demand side, resources are allocated to their highest-valued uses (as reflected in willingness to pay); on the supply side, resources are drawn into activities where prices that demanders are willing to pay exceed the cost of meeting these demands. On this view, social welfare in general is enhanced by providing a broad domain for private ordering.

Most neo-classical economists' commitment to the private ordering process is largely due to their attraction to the Pareto principle. It will be obvious that most collective decisions by government cannot meet the Pareto test; that is, they almost invariably make some members of the community better off, while making others worse off.

However, in a manner analogous to some of the difficulties presented by autonomy theories, certain conditions must be met for this inference of joint welfare enhancement to be justified. Obviously, an exchange coerced at gun-point, e.g., the mugger's proposition, "your money or your life," is not a transaction that meets the Pareto principle: the mugger is made better off by the transaction but the passer-by is worse off. Beyond cases of physical force such as this, it is far from clear what degree of voluntariness is required for the Pareto criterion to be met.<sup>52</sup> Similarly, decisions made with imperfect information may lead an individual to regret a transaction and to feel that he or she has been made worse off by it. In what circumstances does the absence of complete information warrant rebutting the inference of joint welfare enhancement?<sup>53</sup>

Additionally, while it may be obvious that most collective decisions cannot meet the Pareto principle, it is arguable that most private transactions cannot meet it, once third party effects are taken into account. For example, if even one member of society is offended or otherwise aggrieved by a transaction entered into between A and B, so that his or her utility is diminished, even though the transaction between A and B is fully voluntary and informed, it is arguable that the transaction does not meet the Pareto principle. <sup>54</sup>

Finally, the Pareto principle is insensitive to the justice or injustice of the distribution of prior endowments that parties bring to an exchange, and simply takes the existing distribution as a given. On a related point, one might also note that the Pareto principle is not concerned with the division or equality of gains from exchange, as long as each party gains something, however disproportionate are the gains to each.

There are many situations in which the state must make decisions on behalf of the collectivity even though the Pareto principle cannot be satisfied. Economists have accordingly been compelled to recognize a somewhat more complex concept of efficiency, which is often referred to as Kaldor-Hicks efficiency. With respect to Kaldor-Hicks efficiency, the question to be posed with regard to a collective decision or legal rule is: "Do the gainers gain sufficiently from it such that they could hypothetically fully compensate the losers, so as to render the latter indifferent to the decision or rule, while still preserving some gains for themselves?" This concept of efficiency is also referred to as potential Pareto efficiency, which reflects the fact that both sets of parties are not in fact made better off, because the losers do not in fact have to be compensated. In effect, Kaldor-Hicks efficiency entails a cost-benefit analysis, but unlike utilitarianism it only recognizes preferences that are supported by willingness to pay (which is in part a function of ability to pay). The wealth maximization value embedded in Kaldor-Hicks efficiency has been defended by theorists such as Richard Posner on the grounds that individuals who can support their preferences with dollars are, in most cases, only able to do so because they have provided goods and services that are valued by other members of the community, while individuals who cannot support their preferences with dollars have presumably been less valuable members of the community. 55 This attempt at ethical justification of Kaldor-Hicks efficiency has been widely criticized and discredited, largely because willingness and ability to pay often do not reflect any defensible concept of merit, but rather reflect the luck of the genetic lottery or early family circumstance. 56

A more pragmatic justification for the Kaldor-Hicks efficiency principle is that it is more operational than the utilitarian principle, because costs and benefits associated with any proposed policy choice are more easily measured and compared in dollar metrics than in abstract "units" of utility. This justification is also highly contestable. In many policy settings, it will be impossible to secure an accurate revelation of preferences in terms of what people are prepared to pay to see a particular policy option adopted or rejected, and even if accurate preference revelation could be obtained (which is inherently difficult in the absence of voluntary transactions reflecting actual resource allocation decisions), comparing gains and losses entails making highly controversial assumptions about commensurability of utility functions. For example, does a dollar gain to a wealthy person count the same as a dollar loss to a poor person?

Despite these formidable difficulties with both utilitarianism in general and the two efficiency derivatives of it, it must be acknowledged that many decisions that individuals, families, and communities must make often necessarily reflect a crude or intuitive utilitarian calculus. Moreover, the framework has several helpful aspects, such as drawing attention to the full array of options that may be deployed to address a particular resource allocation decision; the opportunity costs associated with each option (what has to be given up in some other context to pursue this option); and how some intuitive calculation of the net costs or benefits associated with particular options compares with those associated with other options.

In the context of the new reproductive technologies, if one accepts that infertility is a problem that requires some collective response, a utilitarian or efficiency framework would examine the costs and benefits associated with all available responses. For example, some feminist scholars, sesentially employing a utilitarian framework, argue that problems associated with infertility could be more effectively addressed, not by expansion in the use of new reproductive technologies, but by focusing more research resources on identifying the causes of infertility, and methods of preventing and curing it. Much current research on causes of infertility appears to focus on female rather than male infertility, and treatments of infertility also tend to focus on women rather than men.

Moreover, a substantial percentage of the incidence of infertility appears to be explained by sexually transmitted diseases, the incidence of which could presumably be reduced by promoting condom use. Yet again, to the extent that some infertility is explained by women postponing childbirth until they have established a career, it is reasonably argued that patriarchal work structures that are inhospitable to women taking time out of the labour force at an earlier age to begin a family should be changed. In similar vein, it might be argued that for some women facing unplanned pregnancies who find abortion morally problematic, more generous state assistance (e.g., special medical needs; living costs during pregnancy and

ideally thereafter) might make the decision regarding abortion, adoption, or retaining a child less influenced by financial constraints. This, in turn, perhaps might lead to more children being available for adoption by infertile couples.

Whatever the advantages and disadvantages of these various options, some kind of rough utilitarian or cost-benefit calculus applied to these and other options is unavoidable in addressing more generally the problems associated with infertility.

#### (C) Distributive Justice Theories

Classical autonomy theories entail a negative concept of liberty that rejects the legitimacy of external constraints on individual action and would perceive forms of wealth distribution as "coerced," if one were able to assume that the initial acquisition of property rights was just. At most, these theorists would advocate a once-and-for-all rectification of past injustices in acquisition. While utilitarian theories contemplate state action in a wider range of circumstances, the objective of maximizing total or average utility has no direct implications for how utility should be distributed.

However, another strand of liberal theory — sometimes referred to as "revisionist liberalism"<sup>58</sup> — focusses on justice in the distribution of resources and opportunities. This entails a positive theory of liberty. According to Hegel and his followers, individual freedom in the full sense offers the opportunity for self-realization. If certain resources, powers, or abilities are needed to effectively achieve self-realization, then having these resources must be considered part of freedom itself. As David Dyzenhaus explains, "all individuals should have the circumstances that make it possible to lead autonomous lives. This preference will require that liberals attempt to eradicate social practices that impose preferences on others, for example, the preference for the patriarchal life." This view is much less concerned than classical autonomy theories with necessarily elusive normative and historical questions as to the justice of initial acquisitions, but rather starts with the status quo. 60 In common with utilitarianism, and in contrast to classical autonomy theories, it shares an end-state or consequentialist orientation.

A basic difficulty with theories of positive liberty is that it is not clear what self-realization entails for different individuals, and therefore what resources are required to make it achievable. Moreover, classical autonomy theorists, if satisfied with the justice of the initial acquisition of property rights, view an expansive conception of positive liberty as providing a justification for continual state involvement in resource distribution to maintain a just distribution of resources over time. This could be viewed as continual state interference in (wealthier) individuals' ability to pursue their own life plans as they please.

The most ambitious and best known contemporary articulation of a theory of distributive justice that attempts to address some of these problems is that provided by John Rawls.<sup>63</sup> Rawls' theory builds on the earlier social contract liberal tradition by constructing a social contract behind a veil of ignorance where individuals do not know their place in society nor their natural endowments. Rawls argues that individuals in such a state (the "original position") would agree to the following principles of justice:

- 1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
- 2. Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity. Inequalities of opportunity are only acceptable if they enhance the welfare of the least advantaged.

This approach has advantages over utilitarianism in that it confers on the individuals in the original position a veto against policies that would maximize general welfare while invading the liberty and damaging the interests of some. While the "maximin" or "difference" principle gives priority to the worst off in society in condemning as unjust any inequalities that do not benefit them, the greatest equal liberty principle prohibits the unjust distributions of "unfreedom" that utilitarianism would permit. Rawls contemplates that his principles of justice would be effected through basic background institutions in society, such as the tax and transfer system, while minimizing encroachments on the autonomy of individuals to pursue, on their own or through association with others, their own particular conceptions of the good life.

In the new reproductive technology context, as noted earlier, distributive justice issues arise on both the demand side and supply side. On the demand side, access to these technologies will, to a significant extent, be a function of wealth. To the extent one believes the general distribution of wealth in society comports with a defensible concept of distributive justice, one might not object to resources being rationed on the basis of willingness to pay. However, we have little reason to be confident that this proposition generally holds true. A distributive justice perspective also draws our attention to the fact that in Canada, as in many other countries, the provision of health care has been generally viewed as a merit good that should be available independently of the resources of those who require care. If one views infertility as an illness or physical disability similar to many others whose treatment is covered by public health care provision, then it would follow that medical technologies that seek to address the consequences of infertility should be rationed on some basis other than willingness to pay, such as some definition of need, or merit, or queuing, or some combination of these. The provision of fetal tissue for therapeutic purposes would also require similar treatment, because fetal tissue is a potentially life-, health-, and dignity-saving resource analogous to organs or bone marrow, which are currently rationed according to criteria such as the above.

On the supply side, classical autonomy theories would be largely insensitive to economic pressures that might drive individuals to supply reproductive materials or services and, indeed, would view this option as one that increases what may admittedly be a very meagre opportunity set. Utilitarianism might also regard the opportunity to increase one's welfare in this way as contributing to average social utility. However, distributive justice theorists are likely to view pressing economic circumstances as symptomatic of inequalities in the distribution of background endowments. Their response would ideally be to rectify these inequalities through society's basic institutions, without necessarily constraining the opportunities of individuals to enter into these arrangements if they so wish. To impose such constraints may well offend Rawls' first principle. Nevertheless, in a society where these inequalities have not been remedied, permitting a system of unconstrained commodification — which would involve financial inducements for suppliers that would disproportionately induce the poor to participate — may well offend Rawls' second principle. 64

Rawls' approach to the issue of distributive justice, along with social contractarian theories generally, has been criticized by some feminists as reflecting an embedded form of patriarchy. For example, Carole Pateman<sup>65</sup> argues that in the hypothesized social contract that Hobbes, Locke, Rousseau, and other earlier liberals contemplated, individuals entered civil societies in which women were already subordinated to men in the private sphere of the family, and men, as heads of the households, were taken as representative of their families in agreeing to the basic structures of the civil society, where women were not recognized, in their own right, as having any place. This, according to Pateman, left women in an oppressed and vulnerable condition where the only contract open to them was the marriage (sexual) contract, which was treated as falling within the private sphere and beyond the domain of civil governance.

While, as a matter of history, these criticisms seem well taken, it is not so clear how contemporary reformulations of social contract theory, such as that proposed by Rawls, are necessarily committed to the same error. However, Pateman argues that the social contract tradition, even in modern Rawlsian form, entails one of two equally unacceptable sets of implications for women. On the one hand, as full individuals in their own right, women can now argue for full equality with men, which entails demanding they be treated "just like men." But in societies like ours, with a long patriarchal tradition of subordination of women, demanding to be treated just like men involves acquiescence in social structures that many women feel are inherently unjust. Alternatively, in Rawls' original position, where natural endowments, like gender, are not known, the social contract that emerges, while perhaps not biased because of patriarchy, abstracts from any inherent differences between men and women and arguably contemplates an essentially androgynous society where gender differences are not

sanctified or celebrated, but are submerged. Either of these two sets of implications is uncongenial to many women, in both the reproductive technology and other contexts.

On the first set of implications, the demand by women to be treated like men entails acceptance of a patriarchal view of parenthood where paternity is defined largely in terms of promoting and preserving genetic linkages, and where the relational aspects of parenting are devalued. In this context women's demands for equal treatment may entail accepting male-oriented concepts of private property rights and freedom of contract, and women increasingly conceiving of their role in the reproductive process also in genetic or biological rather than relational terms. On the second set of implications, where these patriarchal biases are avoided, the de-gendered individuals in the original position are so abstracted from real-life human beings that it is not clear what set of social structures would be agreed on to regulate their reproductive processes. However, to the extent they reflect androgyny rather than patriarchy, it can be argued that important differences in the way men and women view their roles in these processes will be lost.

On the other hand, Susan Moller Okin has recently defended Rawls' theory against some of these criticisms. She contends that the original position requires political actors to be empathetic and to take the standpoint of the disadvantaged. Choosers are not required to think as if they were "disembodied nobodies" but, instead, are required to "think from the position of *everybody*, in the sense of *each in turn*." In this view, the original position is not abstraction from difference, but is rooted in "an appreciation and concern for social and other human differences."

We now proceed to review a set of theories that challenge in important ways the individualistic underpinnings of the three liberal theories reviewed above. The first set of such theories, while sharply different from each other in various respects, are placed under the general rubric of "essentialist" theories, because they share the claim that there is some essence to human nature, or some core of community values, with which unconstrained individual choices in the reproductive context may be inconsistent or which they may violate.

## **III** Essentialist Theories

## (A) Religious Theories

Members of some religions take the view that the nature of the procreative function has been divinely decreed and that worldly laws or practices at variance with this conception contravene God's will. For example, the Catholic Church officially takes the view that sex outside of marriage is immoral, that sex within marriage should not be separate from the act of procreation, and that marriage is a sacred union for life that the parties should not be free to terminate. Life is also thought to begin at conception, requiring that the conceptus be treated with the same respect

and concern that are accorded to a living child. This position leads to opposition to pre-marital sex, to contraception, to abortion, and to divorce. It also leads to strong opposition to most of the new reproductive technologies where reproductive functions can occur outside of the normal marital relationship of husband and wife.<sup>67</sup>

However compelling these views may be to adherents of the religion in question, given the separation of church and state that is fundamental to most liberal democracies, it is not at all clear why the state should feel obligated to act on these views and impose them on members of society who do not subscribe to them. This is without questioning, of course, the right of individuals who do hold these views to act upon them in their own lives. Also, many feminists view these religious positions as sanctifying traditional conceptions of the family, which have often entailed the subjugation and oppression of women.

#### (B) Natural Law Theories

Natural law or natural rights theories, which have come in many different forms over the ages, trace back to Aristotle, who posited that "man's" correct nature or telos could be determined through rational reflection on the essential nature of the person. Aristotle supported this moral theory with a metaphysical biology that depends in the last resort on a mystical conception of nature as a system tending to perfection. According to contemporary theorists of natural rights, such rights embody the conditions necessary for the flourishing of "man" as the distinctive creature that "he" is: we discern the content of these rights by considering the distinguishing marks of the human species and the circumstances in which these characteristics or powers might best be realized. However, as John Gray points out, aside from the arbitrariness of the moral judgments that go into any selection of these distinguishing marks of "man" there is also the moral ambiguity of many distinctive human characteristics. Gray suggests these difficulties in natural law doctrine can be illustrated by a thought experiment:

Let us suppose we are in a position (one we may well occupy in the middle future, given the possibilities of genetic engineering) to alter the content of man's nature or essence: how could the natural law ethic of realizing man's distinctive power help us here? We might refuse to alter human nature, and be wise to do so; but the reason can hardly be that human nature as it is embodies moral perfection. If it does not — and few would dare claim that it does — then we must choose which human powers to foster and which to repress or remould. No ethic which appeals solely to an idea of realizing the distinctive human powers can help us with the radical choice as to, "Which essence shall man have?" 68

The nature of these difficulties is readily demonstrated by a review of different natural law theories as they pertain to reproductive relationships. For example, Aristotle himself defended slavery and the natural inferiority of women. Locke, and other early social contractarians, assumed, as a

matter of either divine will or biology, that: marriage and the family exist in the natural state; the attributes of individuals are sexually differentiated; men naturally have the characteristics of free and equal beings; women are naturally subordinate to men; and the order of nature is reflected in the construction of conjugal relations. <sup>69</sup> In the last century (and occasionally today), social Darwinists and eugenicists propounded theories of the natural genetic inferiority of non-white races. <sup>70</sup> Currently, many sociobiologists claim that the desire to reproduce reflects an inherent genetic trait observable in most animal species to maximize individual reproductive success and perpetuate genetic lineages. <sup>71</sup>

Many modern feminists would reject all of the foregoing essentialist theories of the nature of the reproductive function, and see them as barely disguised efforts to rationalize the subordination of women by confining them to conjugal relationships where their principal function is that of childbearer and childrearer, and excluding them from equal participation in civil society. However, some modern feminists themselves propose an "essentialist" theory of the reproductive process. For example, Margaret Jane Radin<sup>72</sup> argues that permitting the commodification of many human attributes, such as sexual or reproductive functions, is inconsistent with essential conceptions of human personhood or human flourishing. This view leads some writers to object to both commodification of reproductive materials and services and the use of the new reproductive technologies per Specifically, in the context of the new reproductive technologies, feminist writers argue that these technologies fragment the childbearing and childrearing processes, medicalize motherhood, and imply a loss of control by women of their bodies and the birthing process.<sup>73</sup> They reject what they perceive as a patriarchal view of reproduction as exclusively biological in nature, and emphasize what they perceive to be the essentially relational nature of childbearing and childrearing. This view leads to calls for a much more holistic conception of reproduction, which at best rests on some notion of "natural" motherhood.

The motherhood celebrated in this latter view is not the motherhood sanctified by earlier natural law views that entail the subjection of women in traditional conjugal relationships, but the caring and relational values that some feminists believe are distinctively associated with the nature of womanhood. While this view converges in an ironic way with many of the other natural law views of the reproductive function in opposing many aspects of the new reproductive technologies, feminists who take this view are rightly concerned to stress that their opposition focusses on the potential impact of these technologies on the status and welfare of women, rather than being a disconnected focus on the status and welfare of the fetus, preserving traditional family structures, or perpetuating genetically driven notions of parenthood. In this view, the new reproductive technologies, while perhaps having the positive potential for subverting traditional family structures (a feature that is considered *objectionable* by proponents of other types of essentialism), carry offsetting risks of

reinforcing traditional gender stereotypes of women as mother or baby machines. Reinforcing the power of the medical profession in the "medicalization" of pregnancy is also a concern. As Gena Corea writes, "Increasingly, it is the contents of the container that matter, not the container herself. Accordingly, obstetricians are coming to view themselves as 'physician to the fetus.'"

Just as this view reflects concerns that the new reproductive technologies may devalue womanhood by viewing women as merely containers or mother machines, there is a collateral concern that babies will increasingly come to be seen simply as products that parents can "order," with desired characteristics, through control of genetic inputs. The "commodification" of children, like that entailed in treating women as breeding machines, is equally subversive of the relational (rather than genetic) values that many women regard as being of the essence of womanhood and motherhood. Thus, a rich notion of embodied identity is threatened by the fragmentation of reproductive processes entailed in many of the new reproductive technologies. At the limit, one can conjure up scenarios in the future (not unlike Aldous Huxley's Brave New World) where all or most reproduction is reduced to individuals buying or selling genetic inputs into the reproductive process as they please (maybe through specialized mail-order houses or laboratories), incubating embryos in test tubes or artificial wombs, and contracting out the childrearing process to modern-day equivalents of wet-nurses, child care workers, day-care centres, etc., where relations such as those between mother and child, siblings and father, and parents and extended family become non-existent in some cases and transitory or highly attenuated in others. Pateman refers to this scenario as "universal prostitution." 76

This brief review of various essentialist theories that bear on the reproductive process underscores John Gray's doubts that the question "Which essence shall [humankind] have?" is capable of yielding any determinate answer. Gray argues that because various components of human flourishing may often be in intractable conflict with one another, this is decisive against any prospect of reviving a natural law ethics. While there have been recent ambitious efforts to do so, they tend, as in the past, to entail either relatively arbitrary assertions of the essence of human nature, or claims about this essence at such a high level of abstraction that the claims are essentially devoid of meaningful content.

## (C) Conservative Communitarian Theories

Communitarian theories, while exhibiting diversity similar to that of liberal theories and essentialist theories, typically reject the "atomistic," "impoverished" pre-social individualism that is said to characterize liberal theory and the moral absolutism that is said to characterize many essentialist theories. This is not to say that these distinctions are necessarily sharp. For example, some liberals may accept that it is constitutive attachments to particular families, extended families,

communities, groups, and institutions that make life rich and formative of true human identity, but still argue that it is not the prerogative of the state to impose any uniform or monolithic comprehensive conception of the public community on all its members. Rather, it should foster the conditions for mutual tolerance and diversity at both the individual and group level. Similarly, even for natural law proponents like Aristotle, individuals cannot truly express themselves, cannot reach their full and "natural" potential, whatever they themselves believe, until they have participated together in the political organization of the state, i.e., until they become voting and decision-making citizens. Political and social behaviour is not characterized by private interests, but by civic virtue, as individuals collectively determine and implement the values governing the operation of their society.

In our present context, two major strands of communitarianism can be identified: one relatively conservative in its implications, emphasizing the importance of preserving traditional community values; the other much more radical, viewing inherited social structures as often oppressive and seeking to imagine and realize future possibilities of alternative and more benign social structures. We discuss the first in this section, and the second in the next.

The first strand of communitarianism holds that while moral norms may not be immutable or divinely ordained, and are instead relative to given societies or particular periods of history, a substantial or dramatic transformation of these norms may nevertheless lead to the disintegration or destabilization of society. In turn, society is entitled collectively to adopt measures designed to protect its own moral cohesion and to prevent the erosion of its essential common values. This position was made famous by Lord Devlin in his reaction to the British Wolfenden Committee, which recommended, in 1957, that homosexuality between consenting adults be decriminalized. Devlin argued that the overwhelming majority of members of British society at that time held the view that homosexuality was inconsistent with core communal values, and that society was entitled to take collective action to protect those values.

H.L.A. Hart, in his famous critique of Devlin, <sup>81</sup> argued that Devlin's position reduces all issues of morality to whether particular conduct makes the person on the local transit bus feel sick. Devlin's views are, of course, strongly antithetical to classical liberal views, although they do share something in common with utilitarian theories, in that the latter also emphasize maximizing the "good of the many" even if this is at the cost of overriding the preferences of the few. It is clear that moral majoritarianism is the animating force behind the views of many moral conservatives in North America today on issues like abortion, homosexuality, pornography, and the new reproductive technologies, and can claim legitimacy from a political system that is premised on majority rule. Nevertheless, the moral premises of conservative communitarianism are antithetical to many

feminists, who see them as a rationalization for traditional family structures and gender inequalities.  $^{82}$ 

A rather more sophisticated line of communitarian reasoning has recently been developed by scholars such as Michael Sandel, 83 Alisdair MacIntyre, 84 Charles Taylor, 85 and others. 86 Taylor's recent book, *The Malaise of Modernity*, usefully exemplifies the orientation of this line of thinking. Taylor identifies three overarching concerns about the quality of moral life and moral decision-making in modern societies: first, the preoccupation with possessive individualism (to use C.B. Macpherson's phrase); 87 second, a preoccupation with narrowly instrumental reasoning; and third, a detachment or disengagement by individuals from active participation in the political life of their community. For Taylor, the radical individualism sanctified by classical liberal theory leads to a facile form of soft relativism or moral subjectivism, where "doing your own thing," or individual choice, becomes the dominant moral value in and of its own right. According to Taylor, this leads to an individualism of anomie, where moral reasoning or moral criticism becomes impossible in the absence of the acceptance of some self-transcending values. In the absence of acceptance of such values, whether they derive from God, nature, history, or collective participation in a process of self-definition, we are left with social atomism and a culture of narcissism. According to Taylor, narrowly instrumental reasoning leads to a preoccupation with individual selfinterest and a devaluation of the impacts of one's actions and uses of technologies on relationships with others or indeed on nature itself. The detachment of individuals from active participation in the political life of their community undermines any ability to forge consensus on common public projects, endeavours, or goals. This concept of communitarianism is not necessarily either conservative or radical, although the appeal to selftranscendent values tends to emphasize "essential" human values and the importance of preserving continuity and stability in social structures.

Even if one accepts this more nuanced understanding of human beings as social creatures situated in and shaped by social relationships and contexts, the core problem presented by Devlin's moral majoritarianism still remains: to what extent should a community, whatever the degree of public or political participation by its citizens, be entitled to adopt a uniform and monolithic conception of the public good and impose it on individual members of that community who do not share that conception? This dilemma is easily illustrated in the new reproductive technology context. While many individuals today may be offended by, and reject, Lord Devlin's proposition that a homophobic society is entitled to impose its views on individual members who do not share these views, is it any more appropriate for a community, a majority of whose members are opposed to all or many forms of the new reproductive technologies for whatever reasons, to impose its views on individual members of the community who do not share them?

## **IV** Radical Contingency Theories

#### (A) General

A much more radical strand of communitarianism would reject out-of-hand the notion that individual identities and preferences exist in a presocial state (a central assumption of classical liberalism), and would instead view all or most preferences as reflecting contingencies of history, social structures, economic organization, and politics. On this view, preferences are treated as endogenous, not exogenous, to the social structures in which individuals find themselves situated. Thus, rather than asking the question, "How can society's institutions best establish the conditions for the satisfaction of existing preferences?" (as all liberal theories would ask), one would ask the very different question, "What kinds of social structures and institutions do we collectively feel are most appropriate to enable 'true' preferences to be realized?" In other words, the second question implies that the causality between individual preferences and social institutions is reversed.

In discounting the validity of manifest, or apparent, individual preferences, which are viewed as adaptive, endogenous, or socially constructed, radical contingency theories encounter some serious difficulties. For example, if individual preferences can be viewed as lacking independence and validity for these reasons, why would we not suppose that the preferences of legislators, bureaucrats, regulators, and judges would not be subject to the same infirmities? Why is this not a quintessential case of the socially constructed blind leading the blind, unless we make the precarious assumption that when we aggregate preferences in collective decision making, all the sundry flaws and biases in individual preferences get neutralized in one "genuine" collective preference? Or, as Eric Mack puts the point (rather too strongly):

If the problem is that people are such knaves or fools that they cannot recognize or will not choose these components of human flourishing, then who is to be entrusted to design and enforce limitations on the market that will advance genuine personhood and community? $^{90}$ 

Nevertheless, it should be noted that the concept of a *liberal* democracy also rests on the assumption that a group of decision makers (e.g., the legislature, subject to constitutional provisions and entitlements) can collectively determine laws to govern a heterogeneous society; law necessarily, and almost by definition, constrains the variety of "life choices" open to individuals in the interest of preserving harmony amongst individuals. Disagreements between radical contingency and liberal autonomy theorists would seem to centre around the question of how to ascertain (and liberate) "true" preferences, rather than the question of whether to impose collective minority (or majority) preferences on those who disagree with them (which is the autonomist's critique of conservative communitarian theories).

There is a further and in some ways more fundamental circularity problem with theories of endogenous preferences: presumably any form of social, economic, political, or legal organization will be vulnerable to the same claim, so that the validity of individual preferences will be open to challenge ad infinitum by those holding decision-making authority or other members of the community taking different views. Of course, one might argue in Aristotelian fashion that participation in non-hierarchical, dialogic processes of collective self-definition confers on preferences so arrived at a special validity. However, it seems excessively romantic to assume that in the kind of secular and pluralistic society in which we live, consensus could be reached on anything approaching a complete conception of the conditions necessary to facilitate true human flourishing. Nevertheless, it may be possible to identify or devise incremental mechanisms that would enable individuals and communities to consider and evaluate current or traditional preferences in the light of new information, options, and experiences. For example, further increases in workplace options available to women, with the concomitant potential for securing an independent source of income, may (as they have over the past 30 years) offer some women the opportunity to re-examine their former "preferences" to remain in uncongenial relationships, to be the sole provider of domestic services in the home, or to act as gestational service providers.

We now turn to a particular version of this theory of social contingency — radical (or, more accurately, "transformative") feminist theories, which have particular implications for the reproductive exchange context.

## (B) Contingency Feminist Theories

As noted above, many feminists view the new reproductive technologies as threatening women by reinforcing historical gender stereotypes that see women principally as breeding machines. However, some feminists are cautious about accepting essentialist claims about the nature of womanhood or motherhood. These essentialist views largely rest on the notion of inherent differences between men and women — in the present context, in the value that women place on relationships, caregiving, and nurture. These values have been given much prominence in work by scholars like Carol Gilligan92 who, in her research on the developmental patterns of young boys and girls, found that girls valourize notions of caregiving and altruism in relationships, while boys emphasize an ethic of justice and rights. However, it is not clear that Gilligan claims that these are essential or inherent differences. While this work has led some feminists to claim that women have an inherently different form of moral development, other feminists, such as Catharine Mackinnon, argue differently:

For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness ... So I am critical of affirming what we have been, which

necessarily is what we have been permitted ... Women value care because men have valued us according to the care we give them. 93

In similar vein, the question of women's altruism as a motivation for participation in reproductive exchange relationships must be addressed. Richard Titmuss, in his well-known book, The Gift Relationship: From Human Blood to Social Policy, 94 argued that important non-economic values, such as a sense of altruism, reciprocity, and community, are fostered by a donation rather than a commercial system of blood supply. He argued that Britain, which has traditionally depended on a system of voluntary blood donations for transfusion purposes, has outperformed the United States. which has traditionally relied on commercial payment for blood, on a number of dimensions, such as the quantity and quality of blood supplied and the avoidance of severe shortages and surpluses, in addition to the fostering of the non-economic values noted above. Janice Raymond, however, argues that the distinction often proposed between commercial and altruistic arrangements in the reproductive exchange context is suspect<sup>95</sup> because women's participation may simply be a reflection of a long history of subjugation and socialization, whereby women have been induced or compelled to value themselves in accordance with their reproductive abilities and to see themselves as under an obligation to be caregivers, childbearers, or nurturers if this serves men's needs. Thus, to the extent that patriarchal family and social structures have induced women to accept, over time, that their most appropriate role in life is as childbearers and childrearers, we should not take these preferences as given, but rather see them as a result of a long history of oppressive and biased socialization processes (a position strikingly similar to that taken by John Stuart Mill in his essay, The Subjection of Women). 96 On this view, many feminists would contend that encouraging the development and use of new reproductive technology in many contexts, whether on a commercial or non-commercial basis, carries serious threats to the status of women, unless the contingencies of history, culture, society, economics, and politics, which have conspired to subordinate women over history, have first been attended to.97

More specifically, it is argued that narrow conceptions of consent or coercion typically espoused by classical liberal theory and neo-classical economics — which ask whether a particular proposal is a threat or an offer, or whether it makes the recipient better or worse off relative to her starting point — simply fail to recognize the social and economic inequalities that often leave women with highly constrained choices. In other words, a more contextual conception of coercion is required. If adopting this more contextual conception of coercion leads to the view that most women are prepared to contemplate entering into exchange relationships with regard to reproductive materials or services only because other avenues of self-fulfilment have been systematically foreclosed to them, then these technologies should be prohibited.

It is also argued that disability, including infertility, is, in part, a social rather than a medical or scientific construct. <sup>98</sup> The perception of infertility as a tragic deficiency that can be remedied only by obtaining one's "own" child in some other way also detracts from the exploration of other options open to women (and men) who wish to nurture, guide, assist, and share themselves with others. These options include volunteer and paid work with children in the community, spending time with the children of friends and family, foster parenting, and even work with other groups, such as teenagers, immigrants, or elderly persons. To the extent that the new reproductive technologies carry the potential for reinforcing and perpetuating this view that women are not fulfilled unless they are able to conceive, bear, and raise children, they are highly antithetical to women's interests.

Moreover, it is argued by both some feminists and many non-feminists that the role technology has assumed in most modern societies should not be taken as a given. For example, it is argued more generally that the technological imperative induces us to see everything in the world, including nature and the environment, as simply a resource to be exploited, and that prescriptive (as opposed to holistic) technologies generate a culture of compliance. Specifically, in the context of the new reproductive technologies, it is argued that the technological imperative encourages society to see the reproductive faculties of women as simply another resource to be exploited or "plundered." This tendency is exacerbated in the present context by the fact that the medical profession is maledominated and so combines in a single mind-set both the narrowly instrumental view of the role of technology and a patriarchal view of the role of women in society.

It is argued further that capitalist institutions, historically and currently still dominated by men, conceive of all interactions and relationships as dominated by concepts of private property rights and freedom of contract. According to these concepts, anything one owns can be bought or sold (if there is a willing buyer or seller), without regard to how the commodification of human faculties, or resulting children, may dramatically transform (in a broader systemic sense) social relationships over time.

Finally, a straightforward political argument might be made for constraining the new reproductive technologies, at least in the short run: to the extent that these technologies threaten the dominant role historically played by women in the childbearing and childrearing process, whatever the rights and wrongs of this role, women should not give up this political "card" (perhaps their major card) until equality has been secured in other significant domains.

On this view, it is impossible to determine what role should be assigned to the new reproductive technologies, without first attending to the surrounding contingencies of history, culture, society, economics, and politics, which cumulatively account for the subordinate status of women.

As Mackinnon states in the conclusion to her recent book: "A feminist theory of the state has barely been imagined; systematically, it has never been tried." According to Pateman, "new anti-patriarchal roads must be mapped out to lead to democracy, socialism, and freedom," although, given the deep ambiguities surrounding each of these concepts, this goal can scarcely be claimed to constitute a concrete agenda for action. Nevertheless, if the contingencies that account for present gender inequalities were to be effectively addressed, some contingency feminists might be more agnostic than feminist proponents of "natural" motherhood as to the role that should then be assigned to the new reproductive technologies. It is possible that, in this more ideal world, contingency feminists, who strongly emphasize the right of women to control their own bodies, would find substantial convergence with strong autonomy proponents, including liberal feminists, who argue that these decisions should be the personal prerogative of women.

However, the immediate dilemma posed by contingency feminists is the "double-bind" problem that is entailed in the transition from the nonideal world to a more ideal world. According to Margaret Jane Radin, 104 in moving to a world where truly autonomous individual choices are possible, it is often difficult to decide whether society should, in the interim, adopt a set of policies that heavily constrain the ability of women (and men) to use or participate in potentially harmful activities on the grounds that, for the time being, fully autonomous choices (reflective of true preferences) are not possible. Some autonomy theorists might argue that this risks a new form of authoritarianism or paternalism (parentalism), not sharply dissimilar from that entailed in the position that Lord Devlin took on Moreover, it is possible that heavy constraints on homosexuality. participation in exchange relationships relating to the new reproductive technologies might risk, in the short run, implying that women are incapable of making choices about their lives, thereby perhaps perpetuating rather than undermining gender stereotypes about the capacities or incapacities of women to participate fully as equal moral agents in all aspects of social life. Yet the second horn of the dilemma is that, if potentially harmful activities such as the commercial exchange of reproductive materials and services, and indeed the proliferation of the reproductive technologies more generally, are not constrained in the short term, we may risk further exacerbating the disadvantages that women face in contemporary society.

#### **V** Conclusions

Between the extremes of the atomic individualism and narcissism arguably entailed in classical liberalism, the moral absolutism arguably associated with many forms of essentialism, and the radical indeterminacies arguably entailed in many contingency theories, where are we left in terms of identifying some normative signposts to guide us in decisions

regarding the regulation of the new reproductive technologies? This question is rendered particularly intractable, not only because different members and groups in the community will have different and strongly held views as to which of these perspectives represents the most appropriate framework for evaluating the new technologies, but also because many individuals will feel simultaneously attracted to the values that are represented in many of the normative perspectives reviewed. That is to say, not only do policy makers face the not unfamiliar problem of different groups in the community taking different positions on the issues at stake, but many individuals themselves may also feel internally torn and anguished over the value conflicts that the issues in this context present.

However, in determining public policies toward these new technologies. it seems crucial to bear in mind, in a non-dogmatic, non-rigid way, the difference between state action and individual and group action. That is, the mere fact that the state has chosen not to act to constrain private activity in a given context does not mean, as many classical liberals stress, that it necessarily endorses, sanctifies, or legitimates private decisions taken in these domains. Moreover, it leaves open a different kind of political discourse — not a discourse directed at the state designed to induce state action, but a political discourse with each other, as individuals and groups, whereby we can seek to persuade each other, through moral argument, of the rightfulness or wrongfulness of individual choices. Apart from the politics of state action, women's groups, for example, can engage in political discourse with other women's groups in persuading individual members to reconceive their public and private roles. Similarly, women and men, as individuals and groups, can debate with each other about how gender relationships can be more constructively conceived. In other words, to view the politics surrounding the new reproductive technologies as centred exclusively or predominantly on state action reflects an impoverished view of the nature of political discourse.

However, this said, we are not so naive as to suppose that the state can remain entirely neutral on the issues posed by the new reproductive technologies. It is already, and will remain, heavily implicated in the level and objectives of funding for medical research in the area, the provision of subsidized health care services, and the choice and administration of a legal framework that, to a greater or lesser extent, facilitates or constrains these technologies. Also, differences in endowments, including power differentials, which individuals bring to exchange transactions, cannot be addressed solely by market mechanisms, and are unlikely to be redressed if the state remains neutral in this area. Thus, any idealized liberal notion of complete state neutrality on these issues is utopian. That is to say, the state has no option but to make a range of collective decisions that will significantly shape the scope and form that the new reproductive technologies, and exchange relationships relating to them, will take in the future.

Finally, despite the indeterminacies entailed in contingency feminist positions as to what role the new reproductive technologies might play if a more ideal, gender-equal, world were to be attained, their central point can scarcely be denied. That is to say, to the extent that all the surrounding inequalities are left unaddressed, to attempt to formulate normatively coherent and defensible responses to the issues raised by the new reproductive technologies in abstraction from the context in which these issues now confront us is a daunting and perhaps impossible task. This is not an argument for paralysis. We have already acknowledged that the state is not now neutral over these issues, nor will it be in the future. It is an argument for viewing the formulation of policy responses to issues raised by the new reproductive technologies in a broader context, and simultaneously promoting a much more broadly conceived policy agenda that situates the new reproductive technologies in this broader policy context.

# Part 4. Implications of the Major Normative Perspectives for the Principal Exchange Scenarios

This part reviews the implications and key insights of the normative perspectives sketched in Part 3 for the regulation of the three basic exchange scenarios identified at the end of Part 2: gametes and preembryos, gestational services, and fetal tissue. In Part 5 we explain how we propose to integrate elements from these various perspectives into a set of principles that will apply to all three types of exchanges. In this context, we discuss the role we would assign to commodification in the larger scheme of the debate about reproductive materials, services, and technologies, and the use of fetal material. In Part 6, we conclude the study by applying this common set of regulatory principles to each of the three exchange scenarios, and identifying the key elements in a set of consistent regulatory schemes for gametes and pre-embryos, gestational services, and fetal material.

## I Exchange and Storage of Gametes and Pre-Embryos

## (A) Preliminary Qualifications

The exchanges of these two types of materials — gametes and preembryos — are discussed together because they raise many of the same issues. We set out several of these common issues at the beginning to avoid repetition in the section on the application of the major normative perspectives.

## (a) Issues Common to Gametes and Pre-Embryos

#### (i) Introduction

Commodification of gametes and pre-embryos raises at least five key issues: basic rights and obligations of suppliers and demanders and the extent of the right to "own" reproductive material; the problem of competition leading to differential pricing; the significance of the differences between sperm, ova, and pre-embryo donation; the impact of commodification on the proliferation of the technologies per se; and the possibility of an increase in demand for reproductive materials and technologies. Some of these issues are relevant to the exchange of gestational services and fetal material and even to non-commodification (self-regarding) situations as well. The implications of these issues for gamete and pre-embryo exchanges are our current concern, although we consider implications for the other two exchange scenarios (exchange of gestational services and fetal material) later in this section.

#### (ii) Donor and Recipient Responsibilities

Beginning with the first issue, one might ask: should suppliers be permitted to designate how their gametes or pre-embryos will be used? Suppliers currently surrender rights to their materials; 105 but if a supplier were permitted to designate particulars of the recipient, such as marital status or sexual orientation, supply would likely increase above current levels for some recipients, and others might have difficulty securing a supply. If donors cannot designate recipients, should the state be permitted to set standards? How would these standards be determined? How much information about suppliers should recipients be permitted to request? Should the rights and obligations of donors and recipients be established by a set of background legal entitlements? Should the parties be permitted to contract around these entitlements by surrendering certain rights in exchange for other benefits? Statutory provisions will undoubtedly affect supply: if the legislature, for example, were to give recipients, or the subsequent child, the right to know the donor's name, supply might decrease. 106 With regard to research, should statutory provisions govern the relationship between research and medical interests on the demand side and individual suppliers? Should intermediaries other than the state be permitted to operate?

The supplier's legal relationship to the gametes or pre-embryo is also of vital importance. Can one "own" reproductive material and dispose of it at will like many other types of property, or can one only be said to have an "interest" in reproductive matter, akin to the "interest" that parents have in their living children?<sup>107</sup> Most would agree that a pre-embryo, for example, is not directly analogous to a child, yet most would regard pre-embryos as qualitatively different from personal property (such as a car or furniture) or real estate, since pre-embryos have the potential to become unique human beings.<sup>108</sup>

Incentive effects and subsequent supplier regret are also concerns. What of the possibility that money incentives will encourage young people in straitened financial circumstances to sell their reproductive material at a time in their lives when they have given little thought to the implications of bringing children into the world?<sup>109</sup> Allowing suppliers to change their minds regarding use of their materials would likely have the effect of increasing supply. But what of the situation of supplier regret *ex post*, that is, after the material has been used? What of the woman who supplies ova or a pre-embryo only to discover that she, perhaps due to gestational difficulties, cannot have children, while the recipient of the supplied material does have a child? What of the man who supplied sperm during his years at medical school but later, perhaps at the birth of his own child, feels uncomfortable at the thought that he could have fathered other genetically related children?

## (iii) Competition and Differential Pricing

The second issue — the concern with competition and differential pricing — also has very significant implications for potential suppliers and demanders. Assuming that payment, whatever the amount, will bring about an increase in supply (over what would have otherwise been the case with purely voluntary donation), it is reasonable to anticipate that suppliers may compete with each other and demanders may be more selective than they are at present. In an unregulated market, suppliers with the mostdemanded characteristics would be paid more than those with lessdemanded traits. In our society, reproductive material from some racial and ethnic groups would likely be priced lower than material from, for example, white, blonde, blue-eyed donors. Demanders could pay more for sperm that had been subjected to a sex selection process. One could imagine clinics specializing in "designer" gametes and pre-embryos: prospective parents could simply place an order for a baby of a particular sex with a certain skin and eye colour, level of intelligence, and potential propensity toward musical or athletic interests, etc., and pay for each attribute. Sperm banks purporting to produce children with some of these characteristics are already in existence, 110 and one might anticipate that as scientific knowledge about genetics and heredity increases, it may become possible to predict the likelihood of inheriting such traits. This type of differential pricing has the potential to reflect and shape how we think about ourselves and each other in a way that many people would likely find offensive.

## (iv) The Significance of Differences Among Sperm, Ova, and Pre-Embryo Donation

The third issue pertains to whether the differences between sperm, ova, and pre-embryo donation are significant enough to merit different legal or regulatory responses. In terms of physiological risk, it seems clear that ovum donors bear considerably more risks than do sperm donors. Sperm donation is not medically risky or painful and requires little technological

intervention: cryopreservation and a medical examination including semen tests are usually the only measures involved.111 Ovum donation. conversely, involves use of powerful superovulatory drugs and an ovum retrieval procedure in addition to a medical examination. Ovum donation can also take place under a variety of conditions: first, a woman could sell "spare" ova, obtained as part of her own fertility treatment; or second, the ova could be produced as part of a de novo procedure, that is, the woman undergoes the medical procedure expressly to produce the ova for sale; or third, once cryopreservation of ova becomes possible, a woman could undergo the procedure, sell some of the ova produced, and freeze the remainder for her own use at a later time. Any woman who had frozen ova following any of the above situations could subsequently sell them. It is also important to remember that ova deteriorate as a woman ages, and a woman's body cannot replenish its supply of ova. A man selling sperm can be reasonably certain that he will be able to produce more later. But a woman selling her ova cannot be certain that she will not be subject to early menopause; that the ova she has not yet used will subsequently be suitable for implantation; that she will be capable of carrying the embryo to term; or that the ovulation-enhancing drugs and ova retrieval procedures will not compromise her future fertility. In short, a woman who sells her ova is increasing the risk that she will not be able to have her own genetically related child later.

(v) The Effect of Commodification on the Proliferation of the Technologies, and the Possibility of an Increase in Demand

These issues pertain to possible long-term effects of commodification of gametes and pre-embryos on the allocation of social and medical resources. As the supply of reproductive material increases and more demanders can obtain it, personnel and facilities connected with the new reproductive technologies must keep pace by expanding activities on both the supply and demand sides. There would be an increase in the number of doctors, technicians, and operators of facilities that transport and store reproductive material. For-profit processing companies (which process fetal material to decrease the possibility of rejection by the recipient, and isolate and cause cells to proliferate so that small amounts of fetal tissue can be used for many patients<sup>112</sup>) would also expand. Coordinating agencies and the courts would be increasingly called upon to mediate and resolve disputes between suppliers and demanders.

It is not our mandate to evaluate the technologies per se. However, it must be noted that an increase in the use of reproductive technologies will cause an increase in demand for accompanying technology and personnel on both the supply and the demand sides. Therefore, the costs, benefits, and effects of commodification of the material cannot be considered in isolation from those of the technology: the prevalence of the "commodity" and that of the technology are directly related and will vary together. Moreover, use of the technologies and the services of companion industries

will cost significantly more than the commodified reproductive material itself. The question of who will pay for both the commodified material and the technologies necessary to make use of it must be addressed.

It is also likely that as supply increases and the number of personnel and facilities grows, the new reproductive technologies will receive more publicity and demand will increase beyond the current level. More individuals and couples would decide to make use of the technologies, and more research would be done as a larger supply of material became available and as demand for improvements in the technologies increased. The greater the demand, the greater the pressure on suppliers to meet the demand. This concern returns us to the original question, "How much of this activity do we want?" As each of the above-mentioned issues is discussed within the context of the various normative perspectives we will gain further (albeit divergent) insight into this fundamental threshold question.

#### (b) Storage Issues

#### (i) Introduction

Another key aspect of the commodification of gametes and preembryos is the ability to store reproductive material. Limits on the type and amount of material that individuals are permitted to store for themselves will have a significant effect on the frequency with which the technologies are used and on the number of gametes and pre-embryos that suppliers are willing to supply. Limits on the type of manipulation permitted, e.g., whether a research organization can purchase gametes and make pre-embryos, will affect the volume of demand for each type of material. If demanders, including research interests, are permitted to store only a limited amount of gametes or pre-embryos, both supply- and demand-side markets would be significantly constrained. Issues pertaining to storage of self-regarding material must be addressed since second-order exchanges (e.g., creating pre-embryos with one's spouse, freezing them, and then selling them to a demander) are also forms of commodification.

## (ii) The Ownership and Disposition of Gametes and Pre-Embryos

An important preliminary question is whether pre-embryos ought to be subject to different storage regulations than gametes. Pre-embryos obviously differ from gametes in that pre-embryos are composed of both male and female genetic material and are also genetically distinct from both "parents." Whether an individual "owns" or merely has an "interest" in gametes, most would agree that if a dispute arose between a man and his female partner, for example, over the disposal of her stored ova, the woman should be entitled to decide what to do with her own genetic material. But what if the stored material was a pre-embryo made from the material of both parties? What if the pre-embryo was made entirely from donor material? What if it was made with the woman's ova and donor sperm, but with the initial understanding that the male would be the social father?

What should be done in the event of a dispute over the disposition of donor gametes that have not yet been used by the parties? Should the party that paid for the donor gametes, or for the use of the technology to create the pre-embryo, be entitled to decide, or are there other criteria that ought to be applied? For our purposes, the importance lies not in the answers to these questions, but in the criteria used to determine the answers.

#### (iii) Access to and Regulation of Storage Facilities

It is also important to decide whether different regulations should apply to research interests than to individuals and couples, and what regulations should apply to the owners and operators of facilities for storage. What considerations should guide decisions, for example, about the number of pre-embryos and the amount of gametes that can be stored, or whether gametes can be stored to make pre-embryos at a later time? Should storage facilities be publicly funded or paid for by the individuals that use them?

For all matters affecting gamete and pre-embryo storage, should there be a set of legislated background entitlements, and could individuals contract around some of these? Or should individuals make their own arrangements *ex ante* (before storing the materials), with the proviso that the courts or an administrative body have the authority to resolve disputes should they arise *ex post* (after storage)? If an *ex post* decision is to be made, on what principles ought the decision to be based? Should individual storage facilities be permitted to establish their own regulations and guidelines?

### (iv) Qualifications

These are difficult questions, and the insights provided by the major normative perspectives are limited by the failure of many theorists to consider the specific aspects of storage issues (or, in some cases, to consider storage issues at all). It is also difficult to find theorists who have applied their perspective to *both* gametes and pre-embryos. Accordingly, most of the applications described below are extrapolations from the existing theoretical literature.

The following sections review the implications of each of the major normative perspectives outlined in Part 3 for the exchange of gametes and pre-embryos. Within each section, we begin by addressing the use of reproductive materials for the production of children, and conclude by discussing research interests and other issues particular to storage.

### (B) Liberal Autonomy

The prime tenet of liberal autonomy theory is that individuals must be ensured as much freedom as possible to choose their own life plans and realize their own aspirations. Autonomy theorists would ask of a proposal for commodification: does commodification of this item enhance the choices and opportunities (that is, the autonomy) of the individuals involved? These theorists would not place special emphasis on the fact that

the item in question was reproductive material as opposed to a more conventional item of trade; whether the material was a gamete from a male or female supplier, or a pre-embryo, would be of little concern. An autonomy theorist would be more likely to focus on the effect that a proposed exchange would have on suppliers' and demanders' autonomy. 116

Given this starting point, autonomy theorists would favour individuals holding a property right in their reproductive material. 117 This would allow the individual the greatest scope for choice as to how to dispose of the material, and would allow other individuals to gain title, should that be the supplier's desire. Trade in gametes and pre-embryos would appear to provide demanders with enhanced opportunities to achieve their reproductive (or research) goals, while suppliers could use the money they obtain from selling their reproductive material to better their own situation in life. 118 Feminists argue that the autonomy of lesbian and single female demanders would be particularly enhanced by availability of materials and technologies, since these demanders may have difficulty obtaining reproductive material by traditional means; indeed, the use of such material has the potential to free women from dependence on men for reproductive purposes. 119 Even a married woman could potentially (in the absence of laws to the contrary) avoid a custody dispute in the event of divorce by making use of donor material and registering only her own name on the birth certificate.

Autonomy theorists would accept that since technologies are necessary to enable persons to make use of the commodified material, the technologies should be permitted to proliferate in keeping with the needs of suppliers and demanders. A relatively free market on the demand side would be the mechanism most likely to increase supply, which would have the salutary effect of enabling more demanders (and suppliers) to fulfil their own plans. Liberal autonomy theorists are generally hostile to state-imposed constraints on the activities of individuals, <sup>120</sup> so they would prefer that the market on both the supply and demand sides be as unencumbered by regulation as possible.

Liberal autonomy theory would ideally allow individuals maximum freedom to make their own choices and agreements, while simultaneously maintaining a stable contractual environment that would allow individuals to predict the consequences of their choices. This could be accomplished by establishing the rights and obligations of the parties, and legal remedies such as restitution or damages, as a set of background entitlements, and allowing individuals to contract around these obligations. Despite autonomy theorists' predilection for private ordering over regulation, the need for the state to establish a stable legal framework would be recognized and accepted. One example of a legal background obligation that could be contracted around might be the expectation that the supplier lose all right to determine what may be done with the supplied material: suppliers and demanders could arrange for the supplier to have some contact with the resulting child, or the parties could agree that the supplier be given the

opportunity to change her or his mind about the use to which supplied gametes are to be put.

There are three conditions under which constraints on individual freedom of choice would be accepted: information failure, coercion, or harm to third parties.

Information Failure: Autonomy theorists would investigate whether this type of transaction (gamete and pre-embryo exchanges) is likely to be characterized by a lack of information about what is involved on either the supply or demand side. They would likely conclude that prospective suppliers ought to receive at least a minimum amount of information about what risks are involved in the gamete removal procedure and how the gametes or pre-embryos would be used. 122 Minors and persons unable to fully appreciate what they are agreeing to (e.g., mentally ill or mentally handicapped persons) would not be permitted to participate. Demanders would need to be told what technologies would be employed and what the associated risks would be, and would perhaps need to be provided with information about the possible psychosocial implications of using donor material. The supplier's full genetic history ought to be provided to demanders, as well as information on race and physiological characteristics, such as height, and hair and eye colour. Release of donors' names and addresses would likely compromise their autonomy, however, so neither a recipient nor a resulting child should be permitted to obtain this information unless the consent of all parties was obtained. Conversely, a donor ought not to be permitted to obtain identifying information about the recipient or the child, except by consent. However, one could imagine exceptions, for example, after the child had reached adulthood and with both the child's and the donor's consent.

If consent forms were used to confirm that all relevant information had been provided and risks and stipulations agreed to, liberal autonomy theorists would insist the only consents that ought to be required are those of the supplier and demander(s) — permitting spouses veto power would unduly compromise individual autonomy. However, it would seem consistent with the autonomy of unconsenting spouses or partners to relieve them of any presumption of financial obligation to support the resulting child.

Coercion: Coercion would not be involved in gamete and pre-embryo exchanges unless the financial constraints on suppliers and the rewards offered by demanders were extreme (which autonomy theorists would generally not find to be the case). Autonomy theorists would not find the potential for coercion in family relationships significant enough to warrant forbidding, for example, a woman from supplying ova for her sister's use.

Third Parties: Third party effects would also need to be very tangible and significant to justify state intervention. Autonomy theorists would likely find that the impact on partners, family members, and friends of

suppliers and demanders was not serious enough to meet this threshold test.

Even the effect on the child would not be a serious concern, since the argument would be made that it is better for the child to be wanted and to be born than not to be born at all: one could say that the child's own autonomy was enhanced by it having been given the opportunity to live. 124 The effect on persons with a moral and ethical interest in the exchange would be given very little (if any) weight in a liberal autonomy analysis, since those persons and groups are always free not to participate in gamete and pre-embryo exchanges if they do not approve. In the words of John Robertson, "Unless sale is connected with tangible harm to other persons, the moral or symbolic offense that some people might find in such transactions is not a sound basis for restricting procreative liberty by banning sale of embryos." 125

But while one could argue that the child's autonomy has been enhanced by the fact of its existence, the argument that gametes or preembryos have autonomy capable of being enhanced is far more contentious. Autonomy theorists would likely be particularly hostile to suggestions that pre-embryos or gametes be accorded significance as independent entities. <sup>126</sup> To recognize the pre-embryo as an entity in its own right might require attributing interests to the pre-embryo that conflict with those of its "parents."

Autonomy theorists would be reluctant to assign "interests" to gametes, pre-embryos, and fetuses, when these interests could constrain the autonomy of existing persons and bring into question the concept that reproductive materials are the property of the person whose body produces them. To accord a form of autonomy to the pre-embryo would severely constrain the autonomy of the "parents," since an autonomous entity cannot be treated as property and disposed of by others. Moreover, if the pre-embryo is accorded significance as an independent autonomous entity, then it will be difficult to deny the fetus independent autonomous status in the abortion context. For these reasons, autonomy theorists would prefer to treat both gametes and pre-embryos as property and to regulate both as such.

With regard to the issue of differential pricing, liberal autonomy theorists might recognize that the largely free-market system that they advocate would indeed cause gametes and pre-embryos from some racial groups, for example, to be priced lower than others. While some theorists might be concerned that the pricing of various attributes could lead to discrimination that would inhibit the autonomy of other individuals in society, others might welcome the incentive effect of a market on the demand side in bringing gametes and pre-embryos with more-demanded attributes onto the market. The greater the supply of gametes and pre-embryos with more-demanded attributes, the greater the number of demanders who will be able to have their preferences fulfilled. Indeed, the greater the variety of gametes and pre-embryos with more-demanded

attributes, the greater the range of choices available to demanders. Autonomy theorists are inclined to focus on ways to meet demanders' needs and wants, and are less concerned with investigating the factors, motivations, and social forces that contribute to an increase in demand (or supply), i.e., preferences are taken as given. <sup>127</sup> Given the minimal significance that autonomy theorists attach to third party effects, even if the chance of harm to third parties through discrimination could be shown to be more than just a remote possibility, it would likely not be considered significant enough to trump the autonomy-enhancing supply-side effects of a free demand-side market. A free market on both supply and demand sides would seem to be the most autonomy-enhancing solution.

Since liberal autonomy theorists are concerned with maximizing the number of choices available to the individual and are hostile to state involvement that constrains these choices, they would likely be averse to limiting the number of gametes and pre-embryos that could be stored. Autonomy theorists are not particularly concerned with efficiency (e.g., the costs of unlimited use of the technologies and storage facilities, and the economic resources diverted from other activities), nor are they preoccupied with distributive justice concerns (e.g., the financial inability of some persons to make use of the technologies to produce materials and pay storage costs). Indeed, an autonomy perspective would seem to favour permitting individuals to produce and store as much material, and to use the technologies as many times, as they either desire or can afford to do. One key provison, however, would be that individuals themselves must pay the costs of such activities for, if storage facilities were supported with taxes, the autonomy of users of such facilities would be enhanced at the expense of non-users. This might constitute an unacceptable constraint on non-users' autonomy.

Autonomy theorists' predilection for private ordering would likely incline them in favour of private, rather than public, ownership of storage facilities. Private decision making with regard to disposition of materials would be preferred over standardized legal principles. However, since liberal autonomy theorists do recognize the need for a predictable and stable contracting environment, they would likely endorse a set of background storage entitlements that individuals could contract around. In keeping with the autonomy concern that parties make decisions with as much information as possible, and considering the need for individuals to be able to anticipate the consequences of their choices, autonomy theorists would probably favour individuals signing a consent form setting out their wishes in the case of various eventualities, e.g., divorce, disagreements, etc. Part of the information individuals received might be to the effect that storage of gametes rather than pre-embryos would make later division of the material simpler.

Respect for the autonomy of research interests would likely require they be permitted to acquire and store either gametes or pre-embryos and to use the former to create the latter. A classical liberal autonomy

perspective would hold that limits be imposed upon the activities of research interests only if the activities were such that third parties were tangibly harmed, e.g., if research interests were producing genetically engineered "monsters."

### (C) Utilitarianism/Efficiency

#### (a) Pareto Efficiency

A Pareto-superior exchange is one that makes at least one party better off and no one worse off, with the current state of affairs as the baseline. The key difficulty with Pareto efficiency is that it is nearly impossible to imagine an exchange that does not make at least one person worse off: a third party, however remote from the immediate parties, could be troubled by the thought that this exchange is occurring. This would create what is called an "externality effect" such that the exchange would not meet the definition of Pareto-superiority. We recognized earlier that there are numerous third parties who are disturbed by the thought of commodifying reproductive material, so it is clear that no exchange of gametes or preembryos could be Pareto-superior. Nevertheless, it may be helpful to examine the nature of the exchange between the immediate parties to determine whether, from an efficiency perspective, at least one of the immediate parties is made better off and the other is made no worse off.

Beginning with the demand side, it is apparent that some demanders will be made better off by the exchange: 132 lesbian and single women and childless couples would have greater access to materials, as would research interests. A market on the demand side causing differential pricing would be of benefit to some wealthier demanders, and of detriment to poorer demanders, since poorer demanders would be priced out of the market for the most-demanded materials. (Non-market methods of allocation such as an administrative scheme whereby demanders would be required to pay a standard price for materials regardless of attributes would afford poorer demanders an increased chance of obtaining materials in high demand.) Differential pricing may also have the potential to generate severe externalities in the form of a perception of discrimination against persons of certain races and with certain attributes. Yet, setting aside the issue of externalities, it is clear that some demanders would be made better off in that they would be able to achieve their goal of obtaining reproductive materials, and wealthier demanders would be particularly benefitted because they would have access to materials with the attributes that they most prefer.

On the supply side, the main difficulty is in determining what it means not to be made worse off. Paying suppliers is the most obvious way to reimburse them for the loss of their gametes and pre-embryos. Some would argue that payment is capable of rendering individuals indifferent, or better off, as a result of the exchange. However, it is difficult to ascertain the appropriate payment for enduring physical pain, the risk of subsequent regret, and, in the case of pre-embryos and ova donation, the chance of

inability to produce more ova or pre-embryos for oneself in the future. Efficiency theorists might distinguish between situations involving de novo production of gametes and those involving spares, and between ova. sperm. and pre-embryo donation more generally, in that spares (gametes or preembryos) do not require the supplier to assume physical risks for the sake of the transaction, while de novo ova donation involves pain and risk and de novo sperm donation, though painless, requires the donor's time. Even if one accepts that setting the amount of payment for donors is problematic, it would at least be less expensive to render suppliers of spares indifferent than de novo suppliers. Notably, the inducement effects of commodification are not a concern for efficiency theorists: the efficiency theorist asks, "Does this exchange render the supplier indifferent or better off?" and little or no attention is directed to the distribution of costs and benefits within society, or to whether one party was made substantially better off while the other was rendered only moderately better off or indifferent.

If one were to examine only the immediate parties involved in storage, it would seem that permitting individuals to store as many gametes and pre-embryos as they can afford would make both the individual and the storage facility better off. Should the state, not the individual, pay for the use of the technology or the facility, increased use would make the state (and other citizens and interests) worse off. Pareto-efficiency theorists would likely favour payment by individuals rather than the state for this reason.

Turning to the question of harm to third parties (so-called "externalities"), it is apparent that a significant segment of society (moral interests) is convinced of the need to regulate research interests. Some feminists fear that research interests may, for the sake of scientific knowledge, undertake projects that are socially unacceptable, e.g., eugenics. Another concern is that genetic materials that are "stockpiled" (e.g., hundreds of thousands of pre-embryos in storage) could be used in future (or in secret) by unscrupulous persons (e.g., a black market in white pre-embryos, or many unnecessary experiments on embryos). The possibility of these problems could be minimized if research priorities were scrutinized and access to materials regulated. Given the views of third parties, which would pose significant externality effects, it is difficult to imagine how any unregulated exchange between research interests and storage facilities could be Pareto-superior.

## (b) Kaldor-Hicks/Utilitarianism

Supply, demand, and third party issues cannot be separated in a utilitarian analysis since the utilitarian perspective requires weighing the harms and benefits to all persons and interests affected by the transaction. Utilitarians are relatively unconcerned with the actual consent of the parties to the transaction, and distributive concerns are also unimportant. Instead, the utilitarian is concerned with how the activity in question

affects the average level of utility in society: generally speaking, utilitarians attempt to hypothetically tally all the pleasures caused by the activity and all the pains, and compare the results. The Kaldor-Hicks version of economic efficiency, which is a modern variant of utilitarianism, would express this attempt at balancing pleasures and pains as follows: "Would the gains to the gainers from commodification of gametes and pre-embryos be sufficient to hypothetically compensate the losers for their losses and still leave some gains left over?"

The utilitarian analysis is highly consequentialist: whether there ought to be a property right or simply an "interest" in gametes or preembryos, whether commodification of the material and proliferation of the technologies and companion industries are desirable, and if and how the market should be regulated are dependent entirely upon the consequences of each for all the parties and interests affected by the transaction. 137 The increase in autonomy brought about by allowing a property right must be weighed against the harm to spouses and partners, family interests, moral and ethical interests, and particularly essentialist and contingency theorists, who are concerned about the potential implications of individual choices for society at large. The money gained by suppliers of the material must be weighed against the pain and risk that female suppliers, for example, assume in ovulation induction and ova retrieval procedures (including the risk of future harms such as ovarian cancer, and the risk of supplier regret), to arrive at a sum that is sufficient to provide a social net gain (the pleasures that result from paying suppliers to provide their reproductive material exceed the pains). De novo situations would generate more pain (and would require more offsetting benefits) than situations where spares are sold. The loss to the demander in paying the supplier must be weighed against the pleasure to the demander in acquiring the material and possibly sustaining a pregnancy and having a child, or making important scientific discoveries of benefit to society after using the material for research. The net pleasure to the demander and the net pain (or pleasure) to the supplier must be compared.

But the computation must then also incorporate the harm to moral and ethical interests in knowing that sale of gametes and pre-embryos is occurring; the potential pain (or pleasure?) to the children in knowing that material used to create them was purchased; the long-term effects of this type of transaction occurring and possibly increasing (including the potential that differential pricing will cause discrimination), etc.

The effect of an increase in commodification on the proliferation of the technologies would also have to be calculated in terms of the pains and pleasures to the above-listed parties, with the addition of the pain and pleasure to those interests profiting financially from the industry, e.g., those employed to operate the technologies, the pain to individuals who are deprived of health care resources that would have been available had money not been spent on the technologies, etc. Each of the technologies would have to be considered separately, and the pain and pleasure (which

would be linked to risks, success rates, etc.) for each would need to be tallied individually. Concerns regarding differential pricing, the use of intermediary parties, and the question of whether the state should pay for part of the cost of the commodified material and/or the technologies would further complicate the solution. Likewise, the question of how heavily the market ought to be regulated requires a tally of the above-listed interests as well as those of other possible parties.

In considering whether to limit the number of pre-embryos and gametes stored, utilitarians would consider the costs and benefits. <sup>138</sup> Benefits would be realized by individuals wanting to store their materials, the storage facility, and, most particularly, research interests. Those harmed would include the state (assuming the technologies are government-funded) and individuals and groups who either resent the diversion of social resources to research, use, and facilitation of the new reproductive technologies or are offended at the thought of materials being stored.

To decide whether pre-embryos should be subject to different regulations than gametes, the utilitarian would likely note that more third parties are disturbed at the thought of storage and research on pre-embryos than on gametes. Nevertheless, many third parties (moral interests) may be concerned about "stockpiling" of reproductive materials, particularly by research interests. Some third parties would also want limits on the number of gametes and pre-embryos that individuals and couples could store and the length of time that they could store them, since one could imagine children being bequeathed in wills and born hundreds of years after their genetic parents died, or a woman establishing a dynasty by storing hundreds of ova so that every woman who married into her family could produce children directly related to her.

Given the difficulty in determining how to dispose of a pre-embryo should its genetic parents disagree, and the moral significance that many people attribute to pre-embryos, fewer persons would consider themselves harmed by storage of genetic material if individuals were encouraged to store gametes rather than pre-embryos. More third parties would be satisfied if time limits were set on storage, and research interests supervised and subject to some form of regulation to assure that projects were in keeping with social priorities and norms.

A utilitarian analysis provides very little purchase on the issues of whether commodification ought to be introduced and how it ought to be structured, primarily because there is no principled way of comparing such interests as, for example, the Catholic Church, the owners of a cryopreservation facility, or a childless couple. It also seems that the number of parties who could be said to be affected by the transaction in some way is limitless. The interests that are included and the amount of credence given to the claims of each seem inevitably to fall prey to a host

of unavoidably subjective judgments by the decision maker purporting to perform a utilitarian analysis. 139

But before utilitarianism is completely rejected, it is important to note that there are certain limited, but important, insights to be gained. First, it becomes clear that there are a myriad of potential third parties in any transaction involving commodification, and that a regulatory scheme purporting to address the issue must consider the effects that regulation of suppliers and demanders has upon these multiple and diverse third parties. Second, we know that if we are to weigh research interests against the pleasures and pains of suppliers and demanders, we need to consider the possibility that discoveries made as a result of research will benefit us all. Of course, not all research projects hold out the same prospect for benefit to humanity — some may be better designed than others, some may have greater potential to be of practical benefit, and some may be directed toward gathering knowledge that would assist a larger number of people so perhaps a regulatory scheme affecting the supply provided to research interests could take account of the differences between projects. Third, it is apparent that de novo procedures are more costly (in terms of pain and risk) to the supplier than are procedures involving spares, whereas to the demander, the product is the same in either situation. Fourth, we must be cautious when generalizing about the pains and pleasures of "the technologies," since each technology has its own merits and limitations.

Perhaps the most important insight that we can gain from a utilitarian perspective is that the cost of preventing infertility — through education about protecting oneself from sexually transmitted diseases, ex ante scrutiny of dubious contraceptive measures like the intrauterine device (IUD) and drugs intended for pregnant women such as diethylstilbestrol (DES), and research into both treatment and cure of fertility-impairing infections - may well be far less than the cost of commodifying donor material and providing the new reproductive technologies. Even improved techniques to operate on scarred fallopian tubes, for example, would be less costly than a reproductive technology such as IVF, since a woman whose reproductive system is functional is able to have children naturally, and need not go through the IVF procedure many times if she wants to have more than one child. Also, if more preventable infertility were in fact prevented, there would be less demand for donor material and pressure on the supply side would be relieved: demand would be reduced to a far smaller number of individuals, couples, and research interests. Therefore, social resources that are currently or could potentially be devoted to the new reproductive technologies and the commodification of reproductive material could be spent on some of the many other pressing social needs.

Perhaps the most important consequence of preventing infertility is that the human cost — pain (both psychological and physiological) experienced by donors, recipients, and third parties — would be drastically reduced.

#### (D) Distributive Justice

Distributive justice theorists, in contrast to utilitarians, are concerned with the distribution of costs and benefits within society. Social policy must not only increase the average level of utility; it must ensure that the bulk of the benefits are not reaped by the most advantaged persons in society, and that the lot of the most disadvantaged persons is improved. While the tax and transfer system is the preferred redistributive mechanism, distributive justice theorists also scrutinize the way that certain patterns of exchanges (and social policies) affect the most disadvantaged.

In the context of commodification, distributive justice theorists might be concerned that suppliers would bear a greater portion of the risk and receive a lesser portion of the benefits than demanders. These theorists are concerned that poorer people will be suppliers and richer people will be demanders. If this were the case, the poor would bear the physical risks and the possibility of subsequent donor regret, while the rich, who can afford the time and expense involved in making use of the technologies and in raising a child, would receive the benefits of parenthood. 140 Research interests, which are also wealthy and powerful relative to the least advantaged individuals in society, will make discoveries and advance scientific knowledge to the advantage of everyone, but at a disproportionate expense to poorer people. That is, the poor (who may be disproportionately attracted by the financial rewards offered) will bear the physical and psychological risks involved in providing reproductive materials for research purposes. These concerns are also in keeping with a key bioethical principle adopted in the Belmont report — that research subjects not be drawn disproportionately from disadvantaged groups in the population, and that the resultant discoveries not be of de facto benefit to only the more advantaged groups in society. 141

The question of payment for commodified material is a very difficult issue. The purpose of introducing commodification is to provide incentives to increase supply; however, whatever price one sets for commodified material will be disproportionately attractive to the poor. Commentators such as Michael Bayles and Richard Posner argue that, in a relatively free market, suppliers will compete and the price of the materials will be bargained down, perhaps to cost. 142 Poor people can supply reproductive material at a lower cost than professionals or executives, for example, because the poor have lower opportunity costs. Therefore, poor people would likely become the primary suppliers. Even if the supply-side market were heavily regulated, such that suppliers were paid by the state on a sliding scale at a rate equivalent to their hourly wage, for example, payments would need to be limited at some point since it would be too expensive for the state to consistently provide incentives to the wealthiest members of society. Another problem in a state-regulated market is that in providing incentives to middle-income persons by paying them the wage they are accustomed to receive at their employment, the state will find itself

in the position of paying more-advantaged persons a larger amount of money than it pays to less-advantaged persons who are providing the same service.

There is an argument, made primarily by Posner and other efficiency theorists, that income is in fact redistributed when the rich pay the poor for their reproductive material, since the wealth of the poor is increased (and the wealth of the rich is correspondingly decreased) as a result of the transaction.143 Payment for the supply of reproductive material could become an additional source of income for the poor, who may place a high value on even a small income increase. Further, the argument runs, it would be inappropriate to expect poorer persons (or anyone) to bear the risks and costs of providing gametes and pre-embryos for free, or for a nominal fee. The distributive justice theorist might reply that a society in which the poor have the choice between a substandard quality of life and selling their genetic material to the rich is not a just society: the "choice" of whether to sell one's reproductive material is clearly not the same choice for the rich as for the poor, since the poor person's need for even small amounts of money is so much greater. 144 Also, exchanges that enhance the income of the poor while doing nothing to remedy the causes of poverty and inequality are not distributively just. The justification for society's redistribution of wealth from richer to poorer persons ought to be respect for the intrinsic worth and dignity of disadvantaged individuals, and this entitlement is undermined when the poor face pressure to earn their own way out of poverty by selling their reproductive material to the rich. The argument of efficiency theorists such as Posner would seem to presuppose that the state (and, by implication, society as a whole) bears no responsibility for relieving (or causing) poverty.

It is interesting to note that while distributive justice theorists would take issue with efficiency theorists on the subject of differential impact (distributional consequences), distributive justice theories are unclear with regard to the substantive issue: whether this type of harm — the physical and psychological risks involved in supplying reproductive material — is the type of harm that we, as a society, would want to allow individuals to sustain. More specifically, it is unclear whether distributive justice theorists would indeed permit commodification of reproductive material once their conditions for socioeconomic equality (the basic social minimum) had been met.

Since the key supply-side concern is that the poor would bear a disproportionate share of supply-side burdens (psychological and physiological pain and risk) as a result of their vulnerability to even relatively small financial inducements, distributive justice theorists may recommend that suppliers be offered only nominal payments (i.e., payment at a level that would not act as an inducement to the poor). Another recommendation might be that price differentials among suppliers be prohibited, since persons from historically disadvantaged groups would likely be paid less than those from advantaged groups. Regulating the

market on the supply side in this manner would remove some of commodification's benefits for demanders, such as the beneficial (choice-enhancing) effects of an increase in supply and the (efficiency-enhancing) possibility that competition between suppliers would cause them to compete prices down to cost. Queues and waiting lists for both research interests and individual demanders might develop on the demand side as a result of scarcity of supply. However, distributive justice theorists might argue that unconstrained commodification cannot be justified on the grounds that it would benefit demanders when it would simultaneously impose a significant portion of the burden on disadvantaged suppliers.

The key demand-side concern is that the opportunity to access materials and technologies be extended to disadvantaged, as well as advantaged, persons. Disadvantaged demanders would be more likely to receive access if gametes and pre-embryos were allocated and use of the technologies were financed by the state, rather than financed privately through a demand-side market. It is important to note, however, that extending health care funding to reproductive materials and technologies would likely bring about an increase in demand, since persons who are unable to afford to participate would be enabled to do so. One way to reduce the strain that an increase in demand would impose on health care budgets might be to modify universal coverage, such that those who are more wealthy would be required to pay part (or all) of the costs of their use of the materials and technologies. 146

Distributive justice theorists would advocate state funding for the technologies and for purchase of materials, and would also be in favour of state subsidization of storage facilities so as to ensure access by the poor. However, they would be concerned that state resources also be available for other health care needs: reproductive technologies benefit only those within a certain age range, and the needs of the elderly and children also must be met. Therefore, it would be likely that distributive justice theorists would recommend a limit on the number of gametes and pre-embryos that could be stored, which would also control the number of times that individuals made use of the technologies.

Distributive justice theorists would likely also be in favour of full information and a set of background entitlements with regard to disposition of stored material. These measures would be favoured not only because they ensure a predictable outcome and a stable contracting environment but because they have the potential to protect those who might not otherwise understand how to protect their own interests. Distributive justice theorists might have concerns about permitting individuals to contract freely around their entitlements, since persons who are in a weaker bargaining position (perhaps due to disadvantage such as minimal formal education or extreme financial desperation) could be persuaded by the unscrupulous to surrender their rights. Allowing persons who subsequently regret having contracted around their entitlements to bring their case for *ex post* review by an administrative body or a court might be

a way to constrain this advantage-taking, although it would come at the cost of increased state expenditures.

Distributive justice theorists would entertain some ambiguity with regard to the storage activities of research interests. If research interests are permitted to store as many pre-embryos and use as many gametes to create pre-embryos as they want, discoveries may be made that would benefit all of society; if it were empirically verified that the poor have higher rates of infertility than the rich, discovery of ways to improve fertility would be of special benefit to the poor. However, the materials to which research interests require access — gametes in particular — may tend to be drawn disproportionately from the poor.

An argument could be made that if research interests were permitted to make their own pre-embryos, they would not need to purchase them from the poor, and if they could freeze gametes, there would be less waste (as there is with fresh gametes) and fewer gametes would be needed. Storage would enable research interests to ration materials so that they would not require large amounts of gametes all at once: this would be positive, since a sudden large demand would lengthen queues to the detriment of individual demanders and would place pressure on the supply side. Research interests, if unregulated, could compete with individual demanders and acquire such a large amount of the available material that individual demanders would be forced to wait in long queues or even be unable to obtain materials. However, research interests also have the potential to use less-demanded materials: materials from donors of particular races or with specific attributes may not be required for all research projects, and researchers are sometimes even interested in genetically damaged (and otherwise unusable) gametes and pre-embryos. But since research interests are often well funded and supported by other powerful interests, their priorities may not always be to the benefit of the least well-off. Distributive justice theorists would also be concerned that, if research interests had access to a large amount of genetic material, they might divert a disproportionate amount of resources from other pressing health problems to improvement of the technologies. Due to the possibilities for both benefits and harms, distributive justice theorists would likely recommend permitting research interests to store pre-embryos and gametes and use gametes to create pre-embryos, but with the proviso that regulations restrict the amount of materials acquired and that a publicly accountable agency monitor the projects chosen for research.

### (E) Essentialist and Radical Contingency Perspectives

### (a) Areas of Common Ground

Included within the essentialist and radical contingency perspectives are the Catholic Church, conservative communitarians, theorists who emphasize the endogeneity of preferences, and some feminists. Members of these diverse groups share the view that reproductive materials have unique implications both for the individual and for society as a whole.

These groups reject the notion that the individual is able to make choices and act as a wholly autonomous being, independent of social context. In their view, to assume that the individual has a property right in her reproductive material and can make autonomous choices about how to dispose of it without consideration of the many social and historical factors involved, and without regard to the impact of such decisions on the collectivity, is to adopt an impoverished view of both human nature and human interactions. Catholics and some feminists focus on the need for the collectivity to respect and honour the relationship between the material and the person whose body produced it. 147 Sometimes the additional argument is made that gametes or pre-embryos have a special status different from that accorded to other "possessions" or body parts — that the collectivity ought to respect and honour. Granting the individual an "interest" rather than a property right would allow for a greater recognition of the community's interest in reproductive material, and regulation of exchanges would be understood as enhancing the good of the collectivity rather than as an imposition of state authority on the individual.

#### (b) The Catholic Church and Conservative Communitarians

The views of both these groups may be represented briefly. Both are more concerned with the technologies and the use of donor materials than with commodification per se. The Catholic position that reproduction should take place within marriage, that the link between sexual intercourse and reproduction ought to be maintained, and that the conceptus is the moral equivalent of an existing child and is deserving of respect and treatment as such leads to a rejection of the use of supplied materials and a criticism of the technologies more generally. 148 The belief that life begins at conception leads to a rejection of research on fertilized zygotes, 149 and storage of such materials would be similarly disapproved. Conservative communitarians, like Catholics, are concerned that the institution of the family be maintained, and would be concerned about the potential of donor materials and the technologies generally to pose a threat to the family by enabling children to be created outside of traditional marriage relationships. 150 Since the Catholic Church and conservative communitarians disapprove of the use of donor materials and technologies, they would reject the exchange of such materials whether or not money is involved.

### (c) Radical Contingency Theorists

Feminists in this category differ from Catholics and conservative communitarians in that they do not desire to uphold the traditional family: on the contrary, they, like some feminists within the liberal autonomy perspective, see in donor materials and new reproductive technologies the potential to pose a radical challenge to the family. Feminist opposition to some aspects of the new reproductive technologies (and, importantly for our purposes, to commodification) is premised on a broad-based concern with the position of women in our society. As such, it is difficult to separate feminist criticisms of commodification from their views with regard

to the implications of the new reproductive technologies per se. One common element is the centrality of a feminist understanding of community and human flourishing. Five key concerns are as follows: the social construction of demand; the medical profession and power relations with regard to women as suppliers and demanders; allocation of social resources; the effects of commodification on a holistic understanding of personhood; and the dilemma of the potential of commodification for both empowerment and disempowerment of women.

Many feminists do not begin with the proposition that because a demand for reproductive material exists, supply ought to be increased to meet it; instead, they inquire into the factors that cause the demand, and ask whether it would be better to decrease the demand rather than increase the supply. 153 Feminists are concerned that many women are subject to pervasive social pressures that cause them to form their identity around their ability to bear, raise, and nurture children. 154 Feminists are also suspicious that a significant part of the pressure to make use of the reproductive technologies comes from men who are intent on having a genetically related child even at the cost of significant physical and psychological risk or pain to the female partner. 155 The intense desire to make use of reproductive material is not entirely attributable to an innate need to have children: this type of preference is "adaptive" in that it is shaped by the social environment in which we live. 156 In our consumeroriented and male-dominated society, the natural desire to share oneself with others has been redefined as a need for a child that is one's "own." 157 In light of the social construction of preferences, demanders' "desperation" for reproductive material and technologies is suspect and not to be taken

On the supply and demand sides, feminists express a concern that control over reproductive material and conception is being removed from women and placed in the hands of the medical profession. Many feminists are uneasy about allowing doctors and technicians to make reproductive decisions due to the tendency in recent medical history to unduly disregard the needs and priorities of women: the problems with DES and IUDs, unavailability of abortion, overprescription of anti-depressant medication, and unnecessary hysterectomies and Caesarian sections are prominent examples. Feminists question whether women who agree to sell their gametes are truly making informed choices or whether they are subject to social pressures manipulated by what is perceived as a male-dominated medical profession. As Janice Raymond suggests, even altruism is suspect when it takes place within the context of a patriarchal, pro-natalist society.

Some feminists are also concerned that medical terminology — particularly words that refer to the "success" or "failure" of various parts of women's bodies in response to ovulation induction, for example — contributes to a perception that a woman is inadequate and has "failed" in her reproductive duties. 162 Some more radical feminists fear that if women

sell their ova, over time doctors and the rest of society will come to see women primarily in terms of their "breeding" and "hatching" abilities: as "walking wombs," 163 ova receptacles, or breeding stock. 164 Separating reproductive material from the woman whose body produced it is thought potentially to encourage objectification of both the woman and the material itself. 165

Feminists are concerned that both suppliers and recipients of reproductive material are enduring physically painful, risky, and "invasive" medical procedures that serve the interests of the medical profession in advancing its own self-aggrandizing goals. The use of women's reproductive material for research is also suspect: feminists question why research priorities are directed toward manipulations of the female body rather than toward correction of male-factor infertility, or long-standing female priorities such as the development of safe and reliable contraceptives. In short, feminists are concerned that the exchange of reproductive material will perpetuate pervasive power imbalances in society, and that the needs and preferences of women as a group are not expressed or met in the drive toward commodification of reproductive material.

A related area of concern is that of the appropriate allocation of social resources. Feminists argue that government resources ought to be spent on the needs of existing women and children, not on expensive reproductive technologies. Day-care, welfare, affordable housing, and changes to the structure of the job market to make it more accessible to women are better social investments. Feminists are also concerned that the needs of women and children in other countries, most particularly in the Third World, receive adequate international recognition and support. 169

Another concern is the potential for commodified material to be subject to sex selection, as already takes place with regard to amniocentesis and abortion of female fetuses. <sup>170</sup> In some countries, e.g., India, this is already taking place on a significant scale. <sup>171</sup> If Canadian demanders were able to specify the sex of the pre-embryo, they might be influenced by what some feminists perceive as pervasive pressures to prefer male children, and a discount on female pre-embryos (and a further devaluing of women) could result. <sup>172</sup>

Devaluing of women could also result from commodification if differential pricing were permitted on the basis of the racial background, or perceived characteristics or attributes, of the supplier. For example, differential pricing might cause the genetic material of women from certain minorities to be priced lower than that of other women, and the material from handicapped women could be virtually worthless. Demanders could even identify certain desirable characteristics such as musical or athletic ability, high intelligence quotient (IQ), and various physical attributes such as height and build. To place prices on these various "qualities," or even to think of reproduction in such terms, is to detract from a holistic

conception of personhood by implying that both the female supplier and the resulting child are merely "commodities" for trade. 173

While reproductive technologies and commodification would seem to have many potentially negative implications for women, some feminists also recognize potential for the advancement of women's interests. One example of this "double bind" is that of gamete and pre-embryo storage. On the one hand, storage of reproductive materials would not only involve increased medical control over women's bodies and diversion of social resources as discussed above, but would also enable large amounts of female genetic material to be stockpiled. 174 If technology were to develop to the point where gestation could be simulated, women would lose the monopoly they now have over gestation, and the female body would no longer be needed for reproduction.<sup>175</sup> In an extreme scenario, society could be reproduced and, with sex selection techniques, populated entirely by men. 176 But on the other hand, storage of both male and female gametes could enable women to increase their control over reproduction: storage of ova could enable women to expand their reproductive choices (e.g., storing ova in one's youth, building a career, and planning the optimal time to have children), which could be of assistance to women in our present society who face barriers in a male-oriented workplace. Commodification and storage of sperm could potentially free women from the patriarchal family, in that they would not require marriage, or even a male partner, to have children. It would seem that if reproductive materials, storage facilities. and technologies were in women's control, and if women were not subject to powerful social pressures to have children, then materials, facilities, and technologies could enable women to use their bodies, and plan their lives, in ways that are truly reflective of their own choices and best interests. 177

Some feminists are so critical of the potential misuse of reproductive technologies, materials, and storage facilities in our present society that it seems they would prefer a complete ban, at least in the short term. However, if technologies, storage, and commodification were to be permitted, feminist concerns for unconventional and disadvantaged women, and for the status of women relative to men, would require that facilities and materials be allocated in a non-discriminatory fashion: access would need to be available for all women regardless of income, marital status, race, or sexual orientation. This would certainly not be a complete solution, as the problems discussed earlier - particularly the social construction of demand, and the allocation of social resources — would remain difficult to address. Safeguards could be put in place, such as a limit on the number of materials to be stored and the number of times one could make use of the technologies. Also, given high rates of divorce and relationship breakup, it would seem to be more in women's interests to store gametes than pre-embryos. (We again make the assumption that we have made throughout this study, that storage of ova will soon be as feasible as storage of sperm.) A pre-existing set of background legal entitlements for the disposition of materials would also seem to offer some protection to women who, in our society, may be in a weaker bargaining position than men.

#### II Gestational Services

#### (A) Introduction

The "exchange" of a woman's gestational services for payment can take two forms. In the case of a *preconception agreement*, a woman interested in selling her gestational services provides one of her own ova, through either donation or sale, which is fertilized with the commissioning father's sperm, through either artificial insemination or IVF. In this case the gestating woman is in no sense a "surrogate" mother, for she is both the genetic and the gestational mother of the child. It is this type of gestational sale that has predominated to date. It has also received the greatest public exposure, particularly in the controversial New Jersey case of *Baby M.*<sup>179</sup>

The second scenario for potential gestational service sale is that of *embryo gestation and transfer* where, in contrast to a preconception agreement, none of the gestating woman's genetic material is required. In the case of embryo gestation and transfer, both ovum and sperm are provided by the individuals commissioning the birth of the child. These gametes are generally combined using IVF to form a pre-embryo, which is then implanted into the uterus of the woman providing her gestational services. Though she is obviously the gestational mother of the child, this woman will bear no genetic relation to it. This type of gestational service arrangement is becoming more common, 180 and was exemplified in the recent California case of *Johnson v. Calvert*. 181

Many feminists have questioned the need to distinguish between these two situations in which a woman can sell her gestational capacity. They argue that, for the woman involved, it makes little difference whether the process involves her own ovum, or the ovum of another woman. Once the pre-embryo has implanted into the gestating woman's uterus, her body will behave no differently whether it was her ovum originally or not. This means that, were she to make a claim at birth that the baby was "her" child, this claim ought to be independent of whether or not her genetic material was involved in the formation of the child. To impose a genetically centred notion of motherhood is to deny women's experience, and instead is to impose upon women the male experience of fatherhood, where paternity is defined by genetic ties.

In an article on the subject of gestational vs. genetic "surrogacy," Karen Rothenberg cites a study that reveals that most international laws on the subject establish the birth mother of a child as its legal mother, whatever her genetic contribution. <sup>185</sup> (In fact, these same international laws for the most part hold surrogacy contracts, especially if commercial, to be "illegal, unenforceable, contrary to public policy and/or void." <sup>186</sup>) The legal presumption that a woman who gives birth to a child is its mother accords

with the standard presumption of family law, <sup>187</sup> and is a position advocated by many opponents of enforceable surrogacy arrangements. <sup>188</sup>

Whether or not it is relevant in our study to treat preconception agreements separately from situations of embryo gestation and transfer, and what specific legal presumptions ought to follow from this particular treatment, is an issue that is dictated to a large extent by the implications of the various normative perspectives employed in our analysis. In some cases, the distinction between the two scenarios is important. When it is not relevant, we refer to both arrangements together as "gestational service agreements." The supplier of the "service," who may or may not be the genetic mother of the child, is referred to as either the "gestational mother" or the "birth mother," and the demanders as "the commissioning individuals." <sup>189</sup>

A brief comment is necessary here concerning our use of the word "service." Much of the debate over the sale of a woman's gestational capacity centres on the definition of what it is that is being sold. Elizabeth Anderson suggests that it is fallacious to speak of buying a woman's gestational "services" for the same reason that it is incorrect to speak of buying a baker's bread-baking "services." Clearly in the latter case one buys the bread as a piece of property. Many object to gestational service sales agreements on these grounds, claiming they are "baby-selling" arrangements and consequently ought to be prohibited by law. Even if gestational service agreements are held to involve the sale of babies, however, this conclusion is not determinative for some proponents of such arrangements, who have propounded the merits of a legal system authorizing the sale of babies.

Other than "baby-selling" and "surrogacy" arrangements, gestational service agreements at times have been referred to as "womb rental" agreements, <sup>194</sup> as agreements to transfer "parental rights," <sup>195</sup> or, in the extreme, as "slavery." <sup>196</sup> Any one definition is bound to be controversial, and this we acknowledge in our use of the term "gestational service agreement." We have chosen to refer to the exchange of a woman's "gestational services" because we believe that, whatever else these arrangements involve, at a minimum they clearly involve the provision of these services. <sup>197</sup> For there to be an agreement, a woman must assent to become pregnant and to bear a child — to provide her gestational service — for someone else, to whom she agrees to transfer custody of the child after its birth. <sup>198</sup> While we have had to select our own particular terminology to describe this "exchange" of a woman's gestational services, we hope that some of the alternative understandings of preconception agreements and embryo gestation and transfer agreements will become clear in our analysis.

### (B) Liberal Autonomy Theories

Adopting a liberal autonomy perspective to evaluate gestational service agreements, we ask: do such arrangements provide scope for increased

individual autonomy? In answering this question, it is useful to examine the demand side and the supply side of the transaction separately. 199

On the demand side, childless individuals or couples<sup>200</sup> may see themselves as being denied one of the most cherished sources of joy and pride (and personal satisfaction) in life — procreating and rearing their own children. While adoption is an obvious alternative, in many jurisdictions today waiting lists of adoptive parents for newborns entail many years of delay. Although so-called "special needs" children may be more readily available, not everybody may feel they have the capacity to meet the special demands of such children. Moreover, for many parents, the wish to procreate is partly motivated by the desire to perpetuate the genetic lineage.<sup>201</sup> In the *Baby M* case, the natural father following the death of his mother was the only remaining member of his lineage, the others all having been killed in the Holocaust.<sup>202</sup> Wives of infertile men may also feel some of these concerns, as evidenced by the growth of artificial insemination by third party donors.<sup>203</sup>

On the supply side, the arrangement for the sale of a woman's gestational services may hold out the potential for an enhancement in the autonomy of the gestational mother. The choices these women exercise in offering their gestational capacity for sale may be the result of nonpecuniary desires — for example, an altruistic urge to give "the gift of life" to a childless couple.<sup>204</sup> They may also be the result of pecuniary motivations: a woman may desire to deploy the pecuniary returns from the gestational contract sale to enhance the quality of her own life, or of the lives of her existing family members. Some argue that, given the strongly held view of many feminists and others that women should have full dominion and autonomy over their bodies in deciding whether to abort a fetus or not, 205 the same principle should apply to a woman's decision whether or not to offer her gestational services for exchange. 206 Anything less is paternalistic to women. 207 And once we agree that the ability to control reproductive labour is a right of women, it is difficult to see why the ability to receive compensation for the exercise of that right should be limited.208

Indeed, some feminists have argued that commercial gestational service agreements have at least the potential to transform the confining stereotype of "womanhood as motherhood" by removing the activity from the private sphere where it is largely an uncompensated and assumed duty borne by women, thereby allowing women the benefits of economic recognition of their labour.<sup>209</sup> Carmel Shalev argues that the failure to compensate women for reproductive labour is itself a form of "moralized" exploitation:

It seems clear that the imposition of "wages for reproduction" as a universal norm would profoundly upset the present system of a monetary economy ... Are we all getting richer from the surplus value of the free labor of childbearing women? If so, is not the prohibition of

payment for "surrogate" reproductive services tantamount to moralized slavery?  $^{210}\,$ 

Connected to this is the notion that parental rights and duties can be properly acquired through consent. Arguably, the freedom to consent (or to refuse consent) to parenthood at least partially underlies both abortion and adoption, and proponents suggest that it ought to underlie gestational service agreements as well. The woman who chooses abortion chooses not to undertake the responsibility of parenthood; it could be said that the same is true of the woman who chooses gestational motherhood. In both the Ontario Children's Law Reform Act<sup>212</sup> and the Ontario Child and Family Services Act,<sup>213</sup> the definition of "parent" is largely based on the notion of consent to parental responsibility. If we are to take the analysis one step further and understand parental responsibilities as the voluntary decision of an adult "contracting to become a parent,"<sup>214</sup> then it is not clear why adults should be prevented from making these decisions in the context of gestational service arrangements.

Thus, allowing gestational service agreements at least seems to possess the potential for increasing the autonomy of all parties involved. Liberal autonomy theory would generally favour respecting, as much as possible, individual desires to participate in these arrangements. Larry Gostin writes that "families in our society take many different forms, and a great deal of latitude in 'private ordering' should be encouraged. Tolerance of diversity among families, and in the way they are formed, is part of a rich civil liberties tradition. Society should not be too quick to judge those who, for whatever reason, use surrogacy as a method of reproduction."<sup>215</sup>

However, before concluding that liberal autonomy theory offers unqualified endorsement to the purchase and sale of a woman's gestational service, we must consider the internal constraints of this perspective and address the issues of coercion, information failure, and third party harms. Full freedom to contract for the sale and purchase of a woman's gestational services would not be endorsed by liberal autonomy theorists if any one of these three concerns were not adequately addressed.

First, let us consider the demand side. It may be true that individuals are, in some abstract sense, "coerced" — by social expectations, attitudes, or stereotypes — into believing that they want their own genetically related children. That these desires may be in part socially constructed, however, does not mean they are any less real to the individuals who feel them. While Martha Field argues that a desire to reproduce oneself is not the healthiest motivation for wishing to have a child, there is also a large body of socio-biological literature that attempts to explain reproductive patterns in both human and non-human species in these terms.

Even if the desire to reproduce is "unhealthy" or externally imposed, why should the infertile alone be limited in their ability to fulfil that

desire?<sup>220</sup> "If it is true that women have been brainwashed into having children," liberal feminist Lori Andrews writes, "then both decisions to use alternative reproduction and decisions to have children naturally are involuntary. For an equitable policy, then, we should not forbid women to be mothers through alternative reproduction without forbidding them to be mothers through normal reproduction as well."<sup>221</sup> Feminist Thelma McCormack writes less emphatically that the women's community must remember not to marginalize those women who, for whatever reason, do honestly see their infertility as a problem, and who consequently want to use new forms of reproductive technology to have their own children.<sup>222</sup> Coercion would not appear to be grounds from within liberal autonomy theory for limiting individuals' freedom to buy a woman's gestational services.

Are information imperfections more salient? Forms of information failure that might render a gestational service contract objectionable from the demand side would include cases where the commissioning individuals are not well informed of other options (such as adoption, foster parenting, and childlessness), the medical background of the gestating woman (including any previous pregnancy problems), or the risks and costs associated with the gestational service agreement itself.

Turning to the supply side, many have argued that women who make the decision to sell their gestational services often make decisions that are neither voluntary nor informed.<sup>223</sup> Insofar as a birth mother may face severely constrained alternative choices for income generation and pressing subsistence financial needs, there is the danger that commissioning individuals or their agents might exploit these constrained choices, in effect coercing the birth mother to enter into an arrangement that she would not have entertained in less constrained circumstances. Alternatively, unfair terms might be exacted from her, especially with respect to the level of remuneration.<sup>224</sup> However, as we saw earlier in our analysis of liberal autonomy theory, a choice need not be seen necessarily as morally unacceptable simply because it is constrained. 225 Individuals make many of their choices based on financial considerations and constraints, often with limited alternatives, and we do not seek to overrule the majority of these choices. "Coercion" would have to be caused by more than simply financial constraint<sup>226</sup> to justify limiting supply-side contracting freedom from a liberal autonomy perspective.

Information deficiencies, or inaccuracies originating with the commissioning individuals or the agent acting on their behalf in negotiations with the birth mother, might be cause for more serious concern. Fraud, misrepresentation, or material non-disclosure on the part of the demanders of the gestational service could be damaging to the extent that a gestating woman might be induced to enter into an arrangement highly prejudicial to her own interests.

Even more significant, in terms of supply-side information failure, is the possibility that a significant subset of birth mothers may systematically and seriously underestimate the emotional costs and psychological damage they may incur when they must give up the child to the commissioning parents and thereafter.<sup>227</sup> There is a substantial body of medical, gynaecological, and psychological literature that supports the view that the mother-infant bonding<sup>228</sup> that occurs during gestation is by its nature unforeseeable, and that any forced separation between mother and child in this relationship may result in lasting and irreparable harm to the mother.<sup>229</sup> The underestimation a birth mother may make in this context could leave her in a dramatically compromised position at the time of the birth of the child, when she may desperately seek, in her own interests and perhaps those of her child, to preserve full custody over the child, against the wishes of the commissioning individuals. This concern, more than any other, suggests that a limitation may be permissible from within the liberal autonomy perspective itself on a woman's full freedom to sell her gestational capacity.<sup>230</sup>

A final reason for contracting breakdown may relate to a failure to address third party harms created by the contract, especially with respect to the future welfare of the prospective child.<sup>231</sup> What effect would a gestational service agreement have on the autonomy of the child produced? It is hard to see how one could argue that a child born as the result of a gestational service contract suffered a "decrease" in autonomy (whatever objections that child may eventually have to knowing that her or his birth was "paid for"), since the only alternative for that child was not to have been born at all.<sup>232</sup> There is no evidence that children born of such arrangements are unwanted and, in fact, since they are so clearly desired at their birth, these children may end up feeling more loved and wanted rather than less.<sup>233</sup>

However, specific forms of negative effects on the child may arise in particular cases.<sup>234</sup> What if the commissioning parents, perhaps because of intervening pregnancy or separation, or because the child has been born disabled, renounce the child, whom the birth mother is also either unable or unwilling to support? Provision clearly must be made to avoid as much as possible the substantial harm that would result to a child from such a situation. Significant harm may also be entailed for the child in a situation where the birth mother is forced to give up the baby she has gestated. In this case, not only may the child suffer the emotional trauma of being removed from its resistant mother,<sup>235</sup> but if a custody battle were to ensue, the child would also run the risk of becoming a bizarre kind of celebrity for life (with all of the negative psychological and developmental connotations associated with being involuntarily cast in this role), having been the focal point of high-profile custody litigation at its birth.<sup>236</sup>

From a liberal autonomy perspective many of these concerns are legitimate. However, they appear to argue for a legal framework that constrains them, rather than for a total prohibition of commercial gestational service arrangements, at least if one accepts that in some significant range of cases they carry the potential for substantial increases

in autonomy for all affected parties.<sup>237</sup> The objective from this perspective would be to ensure a stable contracting environment, so that individuals could benefit as much as possible from their own autonomous choices, while recognizing that certain constraints on full freedom of contract would also have to be provided to ensure safeguards against coercion, information failure, and harm to third parties.<sup>238</sup>

Ideally, the price paid for a woman's gestational service in this system would be determined by the parties themselves. Differential pricing — charging more for one woman's services than another's — would be accepted, since it would allow individuals to fulfil their own particular preferences. From this perspective it would make no difference whether a woman was hired for a preconception agreement or for an embryo gestation and transfer, since both situations would have the potential to provide all parties with scope for an increased range of choices and life plans.

### (C) Utilitarian/Efficiency Theories

Can gestational service agreements be said to promote the efficient allocation of resources? Can they be claimed to increase social welfare? As we have seen, neo-classical economics offers two alternative definitions of efficiency, both of which we consider in this context, alongside the more traditional theory of utilitarianism.

#### (a) The Pareto Model

A Pareto analysis of the impact of gestational service agreements would be similar in many respects to that offered by liberal autonomy theory. Rather than asking whether the exchange of gestational services increases the autonomy of the individuals involved, however, Pareto analysts would ask whether such exchanges make participants "better off" in terms of their own subjective welfare evaluations. If a gestational service agreement can be seen to make both suppliers and demanders better off, while making no one else worse off, with the current state of affairs as the baseline, then it can be said to be Pareto-efficient and thus desirable from this perspective.

Many of the same conclusions are likely to be reached here as were reached for liberal autonomy theories. Infertile couples certainly have the opportunity to become "better off" from gestational service agreements, in that they will end up (if all goes well) with a baby who is at least partially, if not completely, genetically related to them (an end-result they have clearly deemed desirable, as they are prepared to pay money for it). Gestational mothers also have the opportunity to become better off, in that they will receive money in return for gestation, a trade-off we can assume these women decided to make as the result of a knowledgeable and self-interested calculation (*ex ante*). As long as women are not coerced into participating and have sufficient information to understand the nature of the activity in which they will engage, we can assume they are making voluntary exchanges in their own best interest.

However, these arrangements are only "efficient" if they render no one else worse off. Can we say this about commercial gestational service agreements? This raises the problem of "externalities" and, as such, it parallels the liberal autonomy notion of harm in many respects. If we can say that the child of a gestational service contract is no "worse off" for being born in this way, in that her or his alternative was not to be born at all, 239 then we can eliminate the most significant "externality" from the equation. What about other third parties? What if the price of gestational service arrangements is high? Will those who cannot afford this price be worse off by reason of being excluded from participating? Efficiency theories answer this question by arguing that limited accessibility to a newly provided service is not unjust to the poor, since though it may restrict their participation in the activity, it technically leaves them no worse off than they were before, when the activity was available to no one.241 The disutility sustained by third parties who are morally offended by the activity noted in earlier sections poses a more serious problem for the Pareto test: if third party concerns are taken into account, the exchange of gestational services cannot be Pareto-superior, because these parties will be rendered "worse off" as a result of the exchange.

If we disregard third party concerns, and address only the supply and demand sides of the exchange, a Pareto-efficiency perspective would seem to suggest that contracting for a woman's gestational services should be allowed and enforced by the law, since such exchange agreements have the capacity to make all parties participating in them better off. <sup>242</sup> In fact, it is precisely because they have the capacity to make all parties better off that these arrangements exist. <sup>243</sup> A possible caveat on their enforcement might be created by the problem of information failure, identified above, whereby gestational mothers may systematically underestimate the pain and grief associated with giving up the baby once born.

However, legalizing any kind of right on the part of the woman to change her mind would be a highly controversial proposal from a Paretoefficiency perspective, since many would argue that the mutual benefits stemming from allowing people to contract for a woman's gestational service depend on the enforceability of these contracts. What benefits are assured to commissioning individuals, who must invest substantial emotional and financial resources in these arrangements, if they know that the gestating woman has full freedom to repudiate her agreement at its conclusion?<sup>244</sup> As such, if gestational service agreements are to be permitted on freedom of contract grounds, from an efficiency standpoint they ought also to be fully enforceable. Because of the difficulty associated with calculating and enforcing damage remedies for breach in this context, <sup>245</sup> "enforcing" a gestational service contract generally means requiring specific performance — direct transfer of the baby once born. <sup>246</sup>

Pareto-efficiency theorists would argue that there are numerous other situations in which we do not demand that individuals have "experienced" the situation in question before they contract to do it. Though the ethical

idea of informed consent requires an understanding of potential consequences, Ruth Macklin writes that it "is unrealistic to maintain that the only way to gain such understanding is to have the actual experience, along with the accompanying feelings." If the standard were higher than that required for conventional medical research or treatment, then only a woman who had had a baby and lost it would qualify, and this would strike many as a strange requirement. According to Posner, to suggest that a woman was not properly counselled or informed before she entered into a gestational service agreement is patronizing. "We do not make people undergo counseling either before signing a contract or before becoming pregnant ... contracts always are made before rather than after they are performed." Lori Andrews puts the point this way:

Nowhere [in the legal doctrine of informed consent] is it expected that one must have the experience before one can make an informed judgment about whether to agree to the experience. Such a requirement would preclude people from ever giving informed consent to sterilizations, abortions, sex change operations, and heart surgery. The legal doctrine of informed consent presupposes that people will judge in advance of the experience whether a particular course will be beneficial to them.<sup>249</sup>

Indeed, the very point of Pareto efficiency is that contracting parties expect *ex ante* (before the fact) to make themselves better off; in entering into the contract they agree to assume the risk that in fact they may not make themselves better off *ex post* (after the fact). Posner argues that if a woman surrenders her right to change her mind in return for a higher price, this is presumably because she prefers the extra money to any extra freedom of choice, for she could always have charged less and retained the right to change her mind. Opponents of this perspective could argue in reply that the bonding process entailed in pregnancy is, by its nature, difficult to anticipate; accordingly, women who enter into gestational service agreements may not recognize the importance of bargaining for the right to change their minds after the child's birth.

Additional economic arguments can be made in favour of enforcing gestational service contracts by specific performance. On the supply side, a highly controversial economic argument could be made that specifically enforceable gestational service contracts could be supported on the same grounds as a market in newborns. Posner writes that "those who attack surrogate motherhood out of a general hostility to free markets do not realize that surrogate motherhood is itself a product, in part, of the interference with a market — the market in adoption. Posner argues that this governmental interference has reduced the supply of babies for adoption below what it would be if the price system operated unhindered, and the demand for substitutes, such as gestational service arrangements (which are in fact a superior substitute since they allow at least partial genetic relationship), has increased. Robert Prichard has elsewhere outlined the advantages that may result from allowing a free market in

babies.<sup>254</sup> It is probable that most of these arguments would also justify an unfettered scope for gestational service agreements. The benefits of such agreements would include: an increase in the supply and quality of newborns;<sup>255</sup> the comparative advantage of newborns being produced by those best able to do so (often those with low opportunity costs such as an already low income); the development of a competitive market structure, with "low entry barriers, a very large number of producers, both actual and potential, slight economies of scale, and enormous difficulties in cartelization";<sup>256</sup> a decreased incentive for brokers and middlemen to become involved, since prices would fall below those in the current black market; and the ability for people with few alternative opportunities to have the opportunity of engaging in productive activity as childbearers.

On the demand side, economists might argue in favour of enforcing gestational service contracts because their enforcement would allow the goods in question (in this case the babies) to go to their "highest valued" uses (as measured by willingness to pay, which is in part a function of ability to pay). "Doesn't it seem fitting somehow," Karen Selick asks, "that people who value babies more than money should get the babies, while people who value money more than babies should get the money?"257 In response to those who argue that only the rich have the means to see their preferences realized in a market for gestational services, Posner has suggested that in fact such a market would be likely to have beneficial demand-side distributional effects.<sup>258</sup> Competition among gestating women acting in a free market would force the price of their services down, making gestational service contracts available to individuals of "modest means" as well as to the wealthy. 259 A greater number of people (at least on the demand side) would thus have the ability to become "better off" by obtaining a child.

This normative perspective thus seems to argue for an almost entirely free market in women's gestational services. For maximum benefit to all parties, the price of the service ought to be set exclusively through private arrangement, so that those on the demand side who value the service most can have access to it, and those on the supply side who want to participate can compete freely. From this perspective differential pricing would not be an issue since, presumably, those people who are prepared to pay more for certain human characteristics or attributes (in either birth mother or baby) will be made better off by their provision. It would seem, moreover, to make little difference from this perspective whether or not the transaction in question involved a preconception agreement or embryo gestation and transfer for, in both cases, the most efficient rule would seem to be the specific performance of the birth mother's promise to give up the child, whatever her "natural" (or genetic) ties to it might be.

# (b) Kaldor-Hicks Efficiency and Utilitarianism: Cost-Benefit Analysis

From the perspective of both Kaldor-Hicks efficiency and utilitarianism, the point of any legal regime designed to regulate or prohibit commercial gestational service agreements would be to maximize the social benefits associated with the practice generally, and to minimize the risks. <sup>260</sup> Before attempting to devise such a regime, then, we must first identify these potential "costs" and "benefits." As we have seen, there are several ways to proceed. We note that it is impossible to consider supply-side and demand-side effects in this context in isolation, since cost-benefit analysis requires that all effects, including those bearing on any third parties affected by the exchange, be evaluated in the aggregate before any conclusion can be reached.

Adopting a utilitarian framework, we ask whether, on the whole, the "good" consequences of allowing the sale of women's gestational services outweigh the "bad" consequences, or whether the bad outweigh the good. <sup>261</sup> Ruth Macklin has provided an indication of what this calculation might involve:

A number of factors must be taken into account: the benefits to infertile couples, and the happiness resulting from having a child that they could not otherwise have; the unhappiness of surrogate mothers who regret having made such an arrangement and seek to get their babies back (a minority of those who have served as surrogates); the feeling of satisfaction in helping others, on the part of women who serve as surrogate mothers and have no regrets; the unknown effects on a surrogate mother's other children — the children of her marriage, who are half-siblings of the child concerned; the uncertain consequences for the children born of surrogacy arrangements — whether they will find it an emotional burden; and other consequences, positive and negative, for the families involved in such arrangements and for others. How can these multiple and varied effects be determined? And even if the relevant empirical facts can be ascertained, how should the good and bad consequences be balanced?<sup>262</sup>

To this list we might add the happiness of children who would not otherwise have been born and who now have good homes and good parents; the physical discomfort and possible health risks caused to gestational mothers by their pregnancies; the extent to which these agreements inhibit the adoption of hard-to-place children;<sup>263</sup> the discriminatory harm created by any differential pricing that might take place; the offence taken by third parties who want to prohibit the gestational service practice altogether; and the costs to society of the increased use of expensive reproductive technologies such as IVF.<sup>264</sup> And the list undoubtedly still remains incomplete. Moreover, as Macklin notes above, even if we have included all the elements in the calculus, it is by no means clear how we ought to perform the calculation.<sup>265</sup> Carl Schneider asks: "How many units of parental happiness are needed to outweigh the units of misery of one surrogate mother who changes her mind?"<sup>266</sup> Answers to questions such as these depend on

subjective judgments about the harms and benefits of gestational service agreements; as we have seen, there is by no means a consensus on these issues.

Given that individual "utility" functions are so incalculable, Peter Schuck (among others) has suggested that, in performing a cost-benefit calculus of gestational service contracts, we abandon the abstract notion of utility and adopt instead the standard economic unit of preference measurement — that of "willingness-to-pay." Here we move into the domain of Kaldor-Hicks efficiency. But is it any easier in this context to calculate anybody's "willingness to pay" than it is to calculate their "utility"? Is it possible to determine how much infertile couples actually financially value the prospect of having a child? Schuck cites as his data the American dollar figure of \$8 000, which adoptive parents are prepared to pay through private adoption agencies to secure a newborn, and points out that through independent adoption agencies many Americans pay far greater sums. 268 In the case of contracted gestation, he suggests the value might be even higher, because of the genetic connection of the child to one or both commissioning individuals. He concludes that with close to a million Americans waiting to adopt, the benefits of gestational service agreements are potentially "massive." Such staggering benefits shift the burden, he argues, to the opponents of gestational service agreements "to justify withholding benefits of this kind and magnitude from people who are willing to pay for them and from the society that shares them. These benefits create a strong presumption that we should regulate surrogacy rather than ban it, especially if regulation can minimize its risks."269

Feminist Christine Overall has facetiously suggested that the "price" of a healthy fetus might be determined by looking at the price charged in the United States for prenatal screening and fetal surgery, both of which are done in an effort to ensure the birth of a healthy newborn. However, even if we could determine these amounts with any sort of accuracy, what would this tell us about how much people actually "value" their own children? Clearly, a \$10 000 gestational service fee does not tell us that children are somehow "worth" only that much. Eric Mack has argued that despite any "price" the market may assign, a core of internally valued activities remains that persistently escapes the market's pricing mechanisms:

Typically, one can know the price of something yet not identify the value of that something with its monetary price because the two somethings are not identical ... What is paid for when one "buys" a child is the opportunity to become parent to that child (the child it will become through one's parentage of it); one does not buy that developing child and one's relation to it. The costs incurred for such an opportunity can hardly be identified with the value (even the discounted value!) one enjoys in the child.<sup>271</sup>

Given the uncertainty in this context about quantifiable values, is it possible to draw any legal conclusions from a utilitarian or Kaldor-Hicks analysis?

One important issue that is raised by cost-benefit analysis, and that can often be overlooked from other normative perspectives, is that of the difference between preconception agreements and agreements for embryo gestation and transfer. In performing a cost-benefit calculation, it clearly becomes relevant to distinguish between these two forms of gestational service arrangements, for each has different costs, advantages, and effects.

In the purely gestational case (that of embryo gestation and transfer), greater risks are involved for both the gestational mother and the female genetic donor.<sup>272</sup> The two women's ovulatory cycles must be made to coincide through the manipulation of drugs; the gestational mother must also take hormonal injections to maximize the chance of successful implantation of the pre-embryo in her uterus. Since both IVF and embryo transfer must take place during the procedure, there is both a higher financial cost associated with this form of gestational service arrangement and a greater chance of multiple births, with all the hazards this possibility brings to both the birth mother and the children. "It is more likely that the gestational surrogate will become a high risk pregnancy, will require a cesarean section delivery, will have more complications, more monitoring, and be unable to continue working throughout the pregnancy. And how do we then fairly compensate for this additional burden of gestational service and relinquishing more than one baby?"<sup>273</sup> Difficult decisions will have to be made in the situation of embryo gestation and transfer about how many pre-embryos the gestational mother ought to have implanted, and what ought to be done with the "spares." In the event of birth defects, more complicated questions may arise concerning the gestational mother's responsibility for a child not genetically related to her.

Some of these questions and complexities will also arise in the preconception agreement context, particularly when IVF is used. While these difficulties cannot be avoided in the embryo gestation and transfer situation, a preconception agreement can be successfully executed with the use of artificial insemination, a straightforward and much less costly procedure than IVF.<sup>274</sup> Of course, preconception agreements carry their own series of complicated legal questions that require resolution. The lesson to keep in mind from the perspective of cost-benefit analysis is that as many as possible of these difficult issues must be considered and resolved in the formulation of any legal regime. The answers to these questions may differ depending on the extent and nature of gestational service arrangements permitted; for example, it appears from the above analysis that the costs of embryo gestation and transfer are generally greater than those of preconception agreements.

#### (D) Distributive Justice Theories

In considering whether or not to endorse the sale and purchase of a woman's gestational services, distributive justice theory requires us to ask: is the distribution of costs and benefits that result from such agreements just? A finding of injustice in the distribution of these costs and benefits might, from this perspective, demand a certain amount of what autonomy theorists would term "paternalism" in public policy, to protect women from the distributive injustice they suffer in being paid to gestate for others. As in the case of liberal autonomy theory and Pareto efficiency, it is possible to examine supply-side and demand-side issues separately.

On the supply side, we must first ask who it is that is supplying gestational service. Though several authors have pointed out that the women who offer their gestational services for sale are not necessarily the poorest women in our society, 276 logic dictates that the financial incentives created by the sale of gestational service will be greatest among those women who most need the money. 277 A gestational service arrangement "is almost always a financial arrangement where the couple purchasing the services of the mother uses its greater financial power to purchase the agreement of an economically disadvantaged woman," writes feminist Susan Sherwin. 278 Whether a woman supplying her gestational services is very poor, lower income, or lower middle class, she is likely always to be the one at the financial "disadvantage" in comparison with those buying her service.

Who are the demanders of gestational service arrangements? With the current price of this service being at least \$10 000, and possibly more, <sup>279</sup> obviously those who are better off financially are at an advantage as purchasers. This becomes even more apparent when one considers allowing the price of gestational service to be entirely determined by the free market; there is no *guarantee* that such a market, through competitive forces, would lower prices, as some have suggested.<sup>280</sup> In fact, differential pricing might well lead to greater prices for those women's gestational services in highest demand — perhaps white educated women in the case of a preconception agreement, or women with broad hips in the case of embryo gestation and transfer. The higher prices paid to these most-desired women would further restrict the ability of those at a financial disadvantage to participate equally as demanders.

Thus, it would seem that the demanders of gestational service agreements are at a financial advantage, whereas those supplying these services, and poorer demanders, are at a financial disadvantage. However, to recognize this reality does not require any one conclusion about its "justice." Posner argues on this basis that gestational service arrangements ought to be encouraged, exactly because they provide poorer women with a financial option otherwise not available to them. To someone who is desperately in need of \$10 000, a court's refusal to allow her to obtain it will seem a hypocritical token of concern for her plight, especially since the court has no power to alleviate that plight in some other way. Addin has

called this the problem of the "double bind," referring to the dilemma that results when restricting a financial option for the poor may create the possibility of further oppressing the women involved even though the option is objectionable on other grounds. This further oppression, Radin writes, "must be weighed against a possible step toward their liberation through economic gain from a new alienable entitlement." 284

It may not be entirely desirable for poorer women exclusively to be those entering into gestational service arrangements, but if these women prefer this option to others, then providing them with that opportunity may well be considered "just" (particularly in the face of an incapacity or an unwillingness to alleviate their financial burden in any other way). Why should people who already have money make more money from selling their gestational services? The inequities of the economic system ought to be redressed in ways that are independent of the sale of gestational services.<sup>285</sup>

In contrast to this argument are many feminists and others who draw a very different conclusion from the recognition that poorer women are those most likely to supply gestational services, largely for the benefit of wealthier persons. These theorists regard the situation as fundamentally unjust. The danger is that the financial disadvantage (and indeed dependency) of the lower-income supplier of the gestational service puts her at great risk of exploitation<sup>286</sup> by the more financially powerful (and secure) demander.<sup>287</sup> Higher (or simply more) bids by demanders may force a greater number of low-income suppliers into the market, and severely reduce the realistic possibility of "autonomous" choice by these suppliers, since the monetary inducement may be too great to resist on moral or other grounds. It could also be argued from a distributive justice perspective that a system that encourages the poor to "buy" their way out of poverty by selling their gestational services to wealthier persons is not distributively just.

The potential for exploitation of the underprivileged is further increased by the availability of embryo gestation and transfer to those demanders who can afford it instead of a preconception agreement.<sup>288</sup> In a preconception agreement, where the gestational mother provides her own ovum for the child, the demanders have an incentive to carefully choose their birth mother, and will likely be prepared to pay more to ensure a good choice. They are likely to want a woman of their own racial background. who has a relatively stable personal lifestyle, and is healthy and intelligent - since this woman will provide half the genetic material for their child. With embryo gestation and transfer, however, the educational and financial background, and even the race of the birth mother, matters little, provided that she is healthy for childbearing. This fact holds the potential for greater exploitation of lower-income, uneducated women of colour and other lowincome women (although it is unlikely that demanders would want to hire extremely disadvantaged women, e.g., women who are starving or suffering from serious illnesses or drug addictions, because these women would not provide an optimal gestational environment for the child). Some disturbing scenarios have already taken place. A particularly poignant example is the case of Alexandra Munoz, a young Mexican woman who was illegally brought into the United States to produce a child for a man living near San Diego. Gena Corea tells the following story:

[Munoz] was told that she would be artificially inseminated and that, after three weeks, the embryo would be flushed out of her and transferred into the womb of the man's wife. She was familiar with the concept, knowing that that procedure was used on cows on farms near her home in Mexico. Several weeks into her pregnancy, she was told the procedure couldn't be done and she'd have to carry the child to term. According to Munoz and her cousin, she was kept in the couple's home and, for most of the pregnancy, not allowed to leave the house even for walks because the wife planned to present the baby as her own. When visiting her husband's family, she wore maternity clothes over a small pillow. Munoz, who had planned to be in the country for only a few weeks for what she thought would be a minor procedure, ended up undergoing major surgery - a caesarean section. She was offered \$1,500 — well below the exploitive \$10,000 fee generally offered white women. She rejected the fee and has won nominal joint custody of her daughter. However, the child lives with the father and Munoz essentially gets visitation. There are constant fears that she will eventually be deported as an illegal alien. 289

The existence of cases such as that of Munoz strengthens the case that gestational service arrangements ought to be banned or at least severely restricted on distributive justice grounds.

On the demand side, concerns about the injustice of restricted access to gestational service arrangements due to financial capacity suggest there is a role for the state in allocating this service if it is to be permitted, irrespective of whether or not there is to be a free market on the supply side. <sup>290</sup> It would not be distributively just for only the rich to benefit from the provision of gestational services. If such services are to be provided, they ought to be subsidized by the health care system, or otherwise financed in a manner that does not restrict those of lesser financial means from having access to them. Of course, the obvious problem with this solution is its cost (to the state). <sup>291</sup>

From this perspective, a legal presumption that the birth mother is the child's mother irrespective of genetic contribution on the part of demanders might partially meet distributive justice concerns, particularly those associated with embryo gestation and transfer. If all birth mothers were treated equally by the law, there would be less incentive for commissioning individuals to engage in potentially exploitative transactions with disadvantaged women, since their rights upon the birth of the child would be equal to those of other women. This position "specifically protects the women of color who may be used to bear white embryos for a fee, by recognizing those women too as the legal and social mothers of the babies they bear." Finally, another way to relieve potential distributive

injustices that may result from gestational service agreements would be to provide only minimal payment for these services, so that disadvantaged women would not be unjustly induced into engaging in them.<sup>293</sup> The point in providing only minimal payment would be to ensure that only those women who altruistically desired to offer their services would participate; those disadvantaged women who were induced to participate by the prospect of financial reward would be less affected (or even dissuaded) by a lower level of compensation. This argument conflicts directly with that advanced by Posner (above), where he suggests that limiting payments to poor women for their gestational services limits the options available to them for escaping their impoverishment.

### (E) Essentialist Theories<sup>294</sup>

When considering the responses of essentialist theories to gestational service agreements, several questions arise. Are these agreements immoral? Are they socially destabilizing? Do they compromise true human choice and expression, and true human flourishing? Do they adversely affect community values? We consider some of these questions below.

One line of essentialist objection to gestational service agreements is that they entail a violation of traditional conceptions of the family. This line of objection is often embedded in broader conceptions of the role of sex, procreation, and marriage, and the sanctity of the fetus as a human life. The most conservative position on these issues, perhaps exemplified most prominently by the official views of the Catholic Church, would hold that sex outside of marriage is immoral, that sex within marriage should not be separated from the act of procreation, and that life begins at the moment of conception. Such convictions led the Catholic Church to oppose premarital sex, contraception, abortion, and nearly all uses of the new reproductive technologies.

This conservative position on gestational service agreements is only indirectly related to the fact that these contracts involve commodification. It is based largely on more fundamental objections to the interference with the human fetus and the use of a woman's gestational service for the purpose of someone else's procreation, whether or not this use involves the transfer of money. A corollary argument can be made about the sanctity of children, and the immorality of treating them as property that can be exchanged. "As a society," Walter Weber writes, "we have decided to consider some things unacceptable even though they may not cause major practical problems. If something is wrong, it is not necessarily just because of abuses. For example, I am sure that there were many good-hearted slaveowners. Nevertheless, we recognize that treating a person as property violates a fundamental moral principle and is wrong, even though people may do so with the best intentions and without apparent practical difficulty."298 Many believe it is ethically impermissible to bring children into the world pursuant to commercial contracts for a financial reward.<sup>299</sup>

Lisa Sowle Cahill argues that parenthood is a relation whose existence cannot be made entirely contingent on choice, despite what many liberal autonomy theorists claim. "Surrogate arrangements are morally objectionable," she writes, "because they insist on free choice about human relations to an extent that constitutes a virtual denial of important material and physical aspects both of the relations of spousehood and parenthood, and of moral obligation in general. Individuals cannot choose in all cases whether they have a certain moral obligation." This position leads Cahill to conclude that gestational service agreements, though they need not be outlawed, should not be given legal protection that would encourage their social practice; each disputed case involving such an arrangement should simply be decided on the basis of the child's best interests, as in the case of custody disputes.

#### (F) Contingency Theories

A different line of objection to gestational service agreements is found in the writings of many feminist theorists. Feminist critiques of gestational service agreements take many forms, some of which we have already referred to. The major question posed is, are gestational service agreements good for women? In what follows, we present some of the major themes of feminist reaction to these arrangements.

Many feminist writers claim that gestational service arrangements embrace an offensive form of utilitarianism insofar as they involve the use of one person — a gestating woman — as a means to the ends of another (usually a fertile man, who desires his own genetically related offspring). <sup>303</sup> The process involves an objectification of the birth mother's body, in the service of others whose interests are deemed more important than her own. <sup>304</sup> The provision of a woman's gestational "services" to others reinforces notions that a woman's primary role is to bear children, and that her worth as an individual is tied to her reproductive (or gestational) ability. <sup>305</sup>

Kathryn Pauly Morgan argues that this overemphasis on a woman's capacity for "motherhood," or at least gestation, also leads to a simultaneous devaluation of this female experience. "We are simultaneously becoming more reproductively defined at the same time as that definition becomes more dangerously anatomized," she writes. With ovulation, conception, gestation, and parenthood divided and allocated among different women by the twin practices of reproductive technology and gestational service arrangements, no integrated notion of maternity remains. Women are left feeling fragmented and isolated respecting their reproductive capacities and, ultimately, their personhood — and this at the hands of a male-controlled medical profession and gestational-service-arrangement brokerage companies controlled by men, and in response primarily to men (and/or upper-class women) who desire offspring.

Speaking of children as objects of a parental "right to reproduce," or as property the possession of which must be assured, is offensive to many

feminists, reflecting as it does patriarchal notions of the family centred around rights and ownership (and protected by the laws of contract and property). 309 Maura Ryan writes:

This way of thinking about the family is in some ways reflective of an old and familiar pattern, one about which feminists ought to be very cautious ... when persons are treated primarily as the object of another's right, and significant relationships are defined wholly according to legal arrangements rather than the experiences of nurture, the symbolic framework is that of the patriarchal family. 310

The practice of gestational service arrangements thus objectifies both children and women, and at the same time reinforces and confirms men as the power-holders in society. To speak of "individual freedom" and "autonomous choice" in a system of structural and systemic biases against women is not to grant women any legitimate authority or power. Rather, it is only to allow women to conform to the limited "preferences" established and validated by those already in positions of power. It is indeed unlikely that wage-laboured birth will mean any more power for women than sexual service, Somer Brodribb writes. "Feet in the stirrups is not the best bargaining position."

Many feminists believe the model of market sale and regulation is fundamentally inappropriate for use in the context of a woman's gestational "services." "Our challenge [as women]," Somer Brodribb writes, "is to resist childbirth as alienated wage labour, and the patriarchal assertion of rights to children and control over female procreativity and corporal autonomy." Gestational services ought not to be a resource that can be alienated and "sold" on the market. "Degradation occurs when something is treated in accordance with a lower mode of valuation than is proper to it." Not only does this activity have degrading results, where the fees paid to these women for their services might vary depending on the mother's physical and mental attributes, akin to the different breeding fees associated with the rearing of pedigree livestock, 18 but such a regime would also have profound symbolic consequences as well.

"Transfers associated with the marketplace," write Capron and Radin, "are simply very different both in their subjective connotations (that all things can be given a dollar value) and in their legal expectations (that people have special rights regarding things that they have purchased) from gifts and other nonmarket transfers." The reason to prohibit commercial gestational service arrangements is "to protect the fundamental rights of women and children to be treated as unique persons not subject to monetization." Once the priceless is priced, Barbara Katz Rothman believes, market considerations take over. Women who participate in the activity "have accepted the alienation of the worker from the product of her labor: the baby like any other commodity does not belong to the producer but to the purchaser." A woman's gestational ability, and the resulting child, are not "products" that ought to be alienated in this fashion.

This theme, about how market transactions may alter (and degrade) the way we think about the "commodities" we sell and buy, is reminiscent of the writings of Titmuss on the subject of the sale of blood. Titmuss objected to the introduction of market practices and language into this and similar contexts because he believed their introduction would lead to a decrease both in individual feelings of altruism and reciprocity and in cohesive notions of community. A similar view is reflected in the Glover Report:

[W]e think it right to stress the way payment affects the psychology of donation, turning what could be an enriching act of altruism into an act more like selling an old motor-bike. Every time we institutionalize the commercial solution rather than the altruistic one, we take a small step further towards a society where more relationships are permeated by the motive of economic gain.  $^{323}$ 

Feminists have argued in the gestational service context that to "consider pregnancy as 'labor or service performed' that can be monetarily compensated is to extend mechanistically the alienation involved in commodification to an arena that involves a person's whole being. A more apt analogy is slavery."<sup>324</sup>

The basic point is that to allow a woman's gestational services to be traded on the market does not reflect a desirable conception of human wholeness or the human community. Radin uses a somewhat individualistic notion of "human flourishing" to suggest that a world that permits a woman to sell her gestational service is not a world where she is free to "flourish" as an individual in a truly human manner. Cher feminists have focussed more on the collective position of all women, suggesting that a world permitting the exchange of gestational services is one that devalues, debases, and delegitimizes women as a group. In either view, the conclusion is that women ought not to be presented with this "choice." Those women who argue in favour of the practice of gestational service sale, or who believe themselves to be participating voluntarily in such a sale, are the victims of "adaptive preferences" or "false consciousness," for no truly humane community would allow or condone the alienation of a woman's gestational services in this manner.

The central objection to gestational service agreements from this perspective appears to be the payment of money to birth mothers for their participation. Payment is both the primary inducement for women to participate in this activity, in which otherwise they might not engage, <sup>327</sup> and the mechanism whereby their bodies and their children are objectified and thus devalued. What does this imply about "altruistic" gestational service arrangements that are entered into without the prospect of financial reward? Many feminists do not object to these private non-commercial arrangements. Others have suggested, however, that the notion of "altruism" itself in this context is a manipulative social construction that threatens women's full freedom and expression. Feminists who take this

view suggest that non-commercial as well as commercial gestational service arrangements ought to be prohibited. 330

Generally, then, we can conclude from this broad review of various objections to gestational service agreements that such agreements ought to be strictly prohibited.<sup>331</sup> Objections to the sale of gestational services seem to stem primarily from the essentialist theories outlined above, as well as from much of the feminist writing on this issue. The opposition of both these types of theorists to gestational service agreements becomes particularly acute when these arrangements involve the transfer of money. It would make no difference from these perspectives whether the agreement at issue was a preconception agreement or embryo gestation and transfer: each arrangement would be offensive and socially destructive. The solution of the Roman Catholic Church in this regard is to introduce strict sanctions against all those who engage in these "illicit" practices. 332 Some feminists have suggested that rather than making gestational service agreements illegal, which would likely penalize some of the women involved in them. these agreements simply ought to be made unenforceable. Child custody disputes would be determined in those instances on the basis of existing custody law, having regard to the child's best interests.<sup>333</sup> Those of this view also favour a ban against commercial brokers who engage in gestational service sales, since these brokers are seen to be an important factor in inducing women into the gestational service practice.

## **III** Fetal Tissue

## (A) Introduction

Fetal tissue becomes available through either a spontaneous abortion (miscarriage) or an induced abortion. Induced abortions are themselves of two types: they may be either elective or therapeutic. Therapeutic abortions include cases where abortion is necessary to preserve the health of the mother or because of a fetal anomaly.<sup>334</sup> Tissue from spontaneous or therapeutic abortions may not be suitable for transplantation because of the likelihood of fetal defects.<sup>335</sup> In addition, since miscarriages generally occur outside of a clinical setting, tissue retrieval is difficult, if not impossible.<sup>336</sup> Therefore, this discussion focusses on the use of fetal tissue obtained from elective abortions.

The circumstances in which fetal tissue becomes available following an elective abortion may differ. First, a woman who is pregnant with an unplanned pregnancy may decide to terminate that pregnancy for reasons unrelated to fetal tissue donation or sale. Second, a woman who is pregnant with a fetus that she intends to carry to term may decide to abort instead in order to donate or sell her fetal tissue. Third, a woman may conceive with the intention of aborting to procure fetal tissue for transplantation. N.P. Terry argues that:

[n]otwithstanding any ethical import this distinction [between abortions of unplanned pregnancies and abortions of intentional pregnancies for

fetal tissue purposes] might convey, it is singularly ineffective in the real world. First, it is flawed in practice because women who abort may have mixed motives. Second, it is overly narrow. In the vast gulf between contraceptive and tissue farming motives, there are numerous additional concerns, such as genetic and therapeutic, that motivate abortions.<sup>337</sup>

The distinction between abortions of unplanned and intentional pregnancies may be problematic, but it provides a useful analytical tool, and has become central to debates over the ethical acceptability of fetal tissue transplants. We will use this distinction, as required, in our analysis of the normative perspectives.

The question of the demand for certain types of tissue procurement practices is difficult to resolve. Whether the supply of donated fetal tissue from elective abortions of unplanned pregnancies is adequate to meet the demand is a contentious issue about which commentators are divided. On the one hand, some cite the growing use of laboratory methods to replicate fetal cells as an indication that demand will not outstrip supply. On the other hand, others argue that the huge number of potential applications of fetal tissue indicate that demand will soon exceed the current supply, resulting in a shortage of fetal tissue similar to the shortage of organs available for donation. For the purposes of our study, we will assume that a demand for intentional pregnancies for fetal tissue procurement purposes could exist.

We would also note at this juncture that the use of fetal tissue in the treatment of degenerative illnesses such as Alzheimer's disease and Parkinson's disease is currently considered highly experimental. The first fetal tissue transplant performed in Canada took place in December 1991, and Victoria General Hospital (associated with Dalhousie University) in Halifax is currently the only Canadian hospital performing this controversial procedure. It was estimated that this procedure would benefit only 3-4 percent of patients with Parkinson's disease. However, we can anticipate that demand for fetal tissue for the purposes of research and experimental treatments will increase in the future, as the properties of fetal tissue and techniques for its therapeutic application are more thoroughly explored. This assumption of conditions of scarcity will inform the discussion below.

## (B) Classical Autonomy Theories

To determine the impact of liberal autonomy theory on the prospective commercialization of fetal tissue transplants, demand- and supply-side issues must be regarded separately.

On the demand side, we must consider the autonomy of the potential recipients of fetal tissue transplants. Critics of fetal tissue transplantation often choose to focus on the interests of the fetus and ignore the potentially life-saving benefits that the technology may bring to persons suffering from various debilitating and often eventually fatal diseases. Health is an important component of personal autonomy, "for without some degree of

physical and mental health it is difficult for a person to exercise his or her autonomy."  $^{342}$ 

G.L. Morgan identifies three different interests that a prospective recipient has in undergoing a fetal tissue transplant. First, the prospective recipient has an interest in the maintenance of her dignity or self-esteem. Many of the diseases for which fetal tissue transplants may offer hope are severely debilitating, and often entail a slow and undignified death. "One's quality of life is likely to decline at the same rate as one succumbs to the disorder, and one's life becomes moulded by the limitations imposed by the disorder and the side-effects of treatment." A potential recipient may view the prospect of a fetal tissue transplant as the only way to recover the self-esteem she lost through the gradual reliance on others and the independence forfeited to the ravages of the disease from which she suffers. 345

Second, the prospective recipient has an interest in maintaining the range of opportunities available to her<sup>346</sup> that her illness has reduced and will continue to restrict further. A transplant that may cure or impede the progress of the disease may open up opportunities previously thought to be lost forever.

Third, the prospective recipient has an interest in reducing "the emotional and physical burden on family and friends caused by the disorder." Some patients will be unaware of the impact of their disease on the lives of those around them, owing to the effects of the disease on their mental capacity; others, however, will be acutely aware of the inconvenience caused to their loved ones, and the lifestyle changes made by them to accommodate the needs of the patient. These latter patients may wish to try any treatment that offers the prospect of reducing the burden of their disease on others.

One commentator has gone so far as to suggest that where potential recipients might die if demand were greater than supply, a ban on commercial payments to potential fetal tissue donors would violate the potential recipient's constitutional right to life and liberty. Clearly, a potential recipient suffers a significant decrease in autonomy if she is denied the sole means of continuing to live, or even of living with dignity and greater bodily integrity. Not all sufferers of diseases that may be curable using fetal tissue transplants will choose to undergo such a transplant, perhaps for moral reasons. However, liberal autonomy theory mandates that their freedom to choose be protected.

Similarly, "[e]ven if payments to donors are not necessary to procure tissue, fees paid to for-profit agencies organized to retrieve and process fetal tissue from aborted tissue may be."<sup>349</sup> A ban on such agencies would also result in a decrease in the potential autonomy of the recipient. Even if the lack of for-profit processing companies<sup>350</sup> can be medically compensated for by the use of immuno-suppressive drugs, the potential recipient's autonomy is compromised by the reduction in her number of choices.

On the supply side, benefits to women who might sell the fetal tissue after an abortion must be considered. The choice to sell or donate fetal tissue may be motivated by non-pecuniary or pecuniary reasons, or the motivations may be mixed. Terry discusses the potential benefits for women who donate tissue as follows:

From the woman's perspective, however, the donation of the tissue might provide a beneficial psychological release. For some women, this release might be "guilt" motivated. For others, the emotions that they would assuage through a donation of fetal tissue are more complex. For example, there have been reports of women carrying fetuses diagnosed as anencephalic wishing to donate their organs or tissue for transplantation.<sup>351</sup>

With regard to financial motivations, a woman may desire to sell her fetal tissue to enhance the financial resources of herself or her family. For many of those who accept the premise that a woman should be able to make an autonomous and free choice to terminate her pregnancy, control over the disposition of the abortus and the ability to receive payment for it follows as an extension of that autonomous choice. Similarly, it can be argued that the freedom to choose to conceive for the purpose of aborting to donate or sell fetal tissue is analogous to the freedom to choose abortion as a method of birth control. Even if there are substantial physical and psychological burdens associated with intentional pregnancies for tissue donation or sale, liberal autonomy theory would dictate that women should not be prevented from freely choosing to undergo such a pregnancy with full information regarding the associated risks and burdens. State of the second state

The question of proliferation of the underlying technologies — the social cost of devoting health care resources to the experimental treatment of diseases using fetal tissue — is somewhat problematic within a liberal autonomy framework. On the one hand, these resources may be necessary for the preservation of the life, health, and dignity of the patient, and may be autonomy-enhancing for such persons. But on the other hand, devotion of resources to this type of treatment may entail a corresponding decrease in resources available to other persons in need of different (perhaps more conventional) medical treatments, and this would compromise the autonomy of these latter persons. An autonomy perspective would ordinarily countenance payment from private resources, because this would avoid compromising the autonomy of those dependent on state resources; however, since the Canadian health care system is almost entirely state-funded - and premised on the concept of universal access to necessary medical treatment — the resolution of this issue from a liberal autonomy perspective is problematic. Liberal autonomy theory would appear to provide little purchase on this issue.

But apart from this issue, it appears that fetal tissue transplants have the potential to enhance the autonomy of the participants. While the motivations of the parties may vary, liberal autonomy theory requires respect for the choices arrived at by the parties as a result of those motivations. As we have seen, however, before a wholehearted endorsement of the sale of fetal tissue can be made from within the liberal autonomy framework, the triad of internal constraints must be addressed. While harm to third parties raises particularly contentious issues in the fetal tissue context, given the lack of societal consensus surrounding the moral status of the fetus, the issues of voluntariness and information failure are also problematic.

Once again, it is helpful to separate the demand- and supply-side issues. On the demand side, the currently experimental nature of fetal tissue transplants, and the desperation of potential recipients who are seriously ill, point to a serious concern regarding the voluntariness of consent:

[I]ndividuals suffering from certain disorders may feel extremely anxious to avail themselves of a new treatment that offers more promise. Yet, precisely because of this motivation, such prospective patients may be persuaded, cajoled or pressured by medical researchers or doctors to undergo experimental treatment. In other words, their predicament renders them vulnerable to undergoing a treatment that may offer minimal benefits. 354

While serious, this concern does not mandate a ban on such transplants but, rather, indicates the need for full information to be provided to a potential recipient before the decision to undergo a transplant is made. The information that must be provided to a potential recipient to facilitate the exercise of autonomous choice includes information about the experimental status of the procedure, and the implications of that status for the researcher or doctor to be able to communicate and quantify the associated risks. Undoubtedly, fetal tissue transplantation is a risky procedure that has some probability of shortening the life-span of the patient, in addition to the possibility that the transplant will be unsuccessful. Prospective recipients should be given information regarding mortality and morbidity rates and the experience of the institution and doctors involved. In addition, since elective abortion is controversial, and some persons in our society find it morally reprehensible, care must be taken to fully inform potential recipients of the source of the tissue that would be transplanted.

On the supply side, the issue of the voluntariness of consent<sup>359</sup> and the potential for coercion and pressure is not as easily resolved. In the words of J.S. Bregman, "An environment of coercion cannot hope to inspire a rational, informed decision by a woman considering donation. Indeed, emotional coercion might operate instead to exploit women and undermine trust in the fetal tissue transplantation field."<sup>360</sup>

With regard to unplanned pregnancies, a woman who is unintentionally pregnant should not be subject to pressure from potential recipients to abort and donate the fetal tissue to them. A prohibition on the

donor's ability to designate the recipient of the material will mitigate any force this concern may have, since a benefit that may accrue to a stranger will be less likely to affect the abortion decision than a benefit to a family member or friend. However, such a prohibition would be a significant restraint on the woman's autonomy, as she would no longer have the right to choose the beneficiary of her donation, or the party to whom she wished to sell the tissue. In a commercial context, her ability to negotiate regarding price would be impeded if she were unable to select the other contracting party. In addition to possible pressure from potential recipients, a pregnant woman who chooses abortion might also be subject to pressure from medical personnel to donate or sell her tissue. "Even where the individual woman having an abortion ... is given the right to choose and to know how the fetus ... will be used, she could feel pressured to comply with the doctor's wishes since she is in a vulnerable position at that time." 362

The situation regarding intentional pregnancies for tissue procurement purposes is somewhat different. As histocompatibility (tissue compatibility) is not currently at issue with respect to fetal tissue, the scope of coercion and pressure that could be experienced by potential donors is both expanded and restricted. The potential for the use of coercion and pressure is far greater when the pool of available donors is expanded to include all women who have the capacity to conceive, rather than just those who are pregnant with an unplanned pregnancy. Since immunological compatibility is not required, the group of potential recipients who might place pressure on a woman to undergo an intentional pregnancy for donation purposes is much larger than in the traditional organ donor context. While the scope for familial pressure may be lessened given the disadvantage of related tissue, which may possess the potential for disease recurrence, the intensity of such pressure should not be underestimated:

Persuasion of this kind is difficult to resist because it is premised on a common moral obligation felt as a response to the needs of individuals and societies. "The degree of moral (and not merely prudential) obligation one feels (and should feel) to make a gift is greatest when the recipient's need is greatest." 366

If fetal tissue is proven effective as therapy for diseases that are not hereditary or genetically linked, then pressure by family members will become problematic as there will not be a significant potential for disease recurrence. This will be even more so if histocompatibility becomes a requirement for the treatment of one or more diseases. This type of pressure may be completely unintentional. The mere fact of a relationship may signify to a potential donor that donation is morally obligatory. One is ordinarily obliged to do all that is reasonably possible to save the lives of close relatives; it is virtuous or heroic to do that for others.

This problem has been partially overcome for live organ transplants by the use of various safeguards against coercion. These include attempts by the medical staff concerned to determine whether coercion is a problem, ample time in which to make the decision, and a full outlining of the risks involved. In addition, a doctor may make the decision not to donate easier by offering to give the potential recipient a fabricated medical excuse such as lack of histocompatibility if the potential donor decides against donation. These precautions are unavailable in the fetal tissue context because histocompatibility is not at issue.<sup>370</sup>

Another possible problem is the coercive potential of a monetary inducement and the related possibility of exploitation of disadvantaged women. As discussed earlier, many autonomy theorists would not consider the fact that the choices available to the potential supplier of fetal tissue were constrained by her straitened financial circumstances to be an impediment to her autonomous decision to sell her fetal tissue. In contrast, Radin argues that a liberal conception of coercion must include the "desperation of poverty." That is, persons whose motivation for "freely choosing" to sell fetal tissue is economic necessity should and must be considered coerced because such sales may be harmful to their personhood. 371

Information failure on the supply side does not appear to be as significant a problem. Since the woman is not a participant in the research or therapeutic use of the fetus, information regarding its risks does not have to be provided to her. "In general, the level of information disclosure that would be expected in informed consent for therapy or research is not required for fetal tissue donation, although the pregnant woman may request any information prior to making a decision about donation." If tests are to be performed on the woman to determine the suitability of the fetal tissue for transplant, she should be informed of this in advance and notified of the results. The woman should also be informed of any plans for the commercialization of the tissue statistic may influence her decision whether to donate, or sell, or even request that the tissue be disposed of.

A separate but related issue implicates concerns with respect to both coercion and information failure. One of the most disturbing and often overlooked aspects of fetal tissue donation is the possibility that the women involved might be asked to undergo more dangerous abortion techniques that have a greater chance of preserving the needed fetal tissue or organs in a useable state. Women may also be asked to postpone the abortion and prolong their pregnancy if fetal tissue at a certain developmental stage becomes more desirable. "In light of the different effects of different methods [of abortion], ... the pregnant woman's free and informed consent is morally appropriate not only with regard to when, but also with regard to how, her pregnancy will be terminated." 375

The Polkinghorne Committee decided that the question of whether women could be asked to undergo different abortion procedures or to prolong a pregnancy was sufficiently self-evident that it merited only the terse statement that "the management of the pregnancy of any mother should be dictated by her health care needs alone, and this will include the

method and timing of an abortion."<sup>376</sup> Autonomy theorists would support the woman's right to consent to any changes in the procedure or timing of the abortion, provided there was no coercive behaviour by the medical personnel involved, and sufficient information regarding the increased risks associated with the changes was made available to the woman. While free and informed consent is uniformly demanded by commentators, it may be impossible to ascertain that such consent has been obtained. One possible solution to this dilemma is to allow changes in abortion procedures or timing solely when information about possible changes is requested by the woman, rather than allowing the doctor to propose them.

A final issue that must be discussed within the liberal autonomy framework is that of harm to third parties. The most significant third party involved in fetal tissue transplants is obviously the fetus. commentators argue that fetal tissue transplants exploit the fetus and therefore cannot be permitted. Whether fetal tissue transplants constitute exploitation of the fetus is a difficult issue that implicates the abortion debate regarding fetal status and the question of personhood. Conclusions in this area are beyond the scope of this study. Nevertheless, a canvassing of the arguments made with specific reference to fetal tissue transplants is necessary to resolve the issue of harm to the fetus caused by such transplants. The debate ranges between two extreme positions: the denial of any status to a fetus, and the labelling of fetuses as persons. N.P. Terry asserts that the heart of the debate focusses between these positions,

where one may identify differently articulated convictions as to the permissible level of reification of the fetus. The tolerable level of reification (and its pejoratively styled legal relative, alienation) itself is a function either of a belief in what the fetus is or what it has the potential to become.378

The effect of fetal tissue transplantation on the fetus must be considered separately with regard to abortions of unplanned pregnancies and subsequent donation or sale, and intentional pregnancies for the purpose of tissue procurement and donation or sale. In the unplanned pregnancy context,

if an abortion has been performed and if the fetus is still nonviable, then experimentation upon the fetus in no way affects the fetus' ability, or lack thereof, ever to realize any of its existing potential. On this view especially, abortion, not experimentation upon the nonviable fetus is the fundamental, morally problematic activity. 379

Some anti-abortionists argue that the use of fetal tissue for transplants further exploits the fetus, over and above the exploitation entailed by the abortion. One response to this contention is that since fetuses are dead when their organs are removed for transplant, they cannot be exploited as they are lacking in any cognizable interests. 380

Assuming, for the sake of argument, that the interests of the fetus when alive continue in some sense after its death by abortion, the nature of those interests is highly contentious. As early fetal cells "cannot feel the anguish or pain connected with death ... words such as 'harm' or 'deprive' cannot be meaningfully used in the context of early abortion and fetal research."<sup>381</sup> Concerns regarding exploitation may become more significant as the fetus develops. This does not now create a problem in the fetal tissue transplantation context, as the optimal developmental stage for the tissue is currently within the first trimester.<sup>382</sup>

The debate regarding the point at which fetal interests develop is extensive. Robertson concludes that this point is reached at viability "because roughly at this stage the fetus attains sufficient physiologic development to be sentient and thus have interests in its own right." This type of analysis was rejected in the Polkinghorne Report as being ethically irrelevant. He use of second or even third trimester fetuses becomes medically desirable in the future, this debate will become central. Further, as neo-natal technology increases in effectiveness, the point of viability will move further back in the pregnancy. This problem was noted by Justice O'Connor of the United States Supreme Court in dissent in Akron v. Akron Center for Reproductive Health when she stated that "[t]he Roe [trimester] framework ... is clearly on a collision course with itself."

Even if the precise nature of fetal interests cannot be determined, most commentators recognize that a fetus can be and must be distinguished from other parts of the human body. The oft-cited ground for such a distinction is the element of potential life present in a fetus. Terry notes that even after fetal death has occurred and it is "clear that such potential will never be fulfilled," many persons still view the potential life of the fetus as morally relevant to its subsequent disposal or use. Thus, while the personhood of the fetus remains contested, moral obligations are owed to the fetus. "Just as we have obligations toward some individuals that are clearly not persons, eg. cadavers and animals, we have obligations toward human fetuses even if they are not persons. However, to others, the use of a dead fetus in transplantation is not disrespectful of its interests or potential, and may in fact be of greater moral worth than the current abortus disposal techniques:

Some members of the medical research community argue that a refusal to utilize this transplant technology based on moral considerations would be a significant ethical or moral offense in itself. As Arthur Caplan indicates, "a society that would throw fetal remains into a dumpster or an incinerator without offering them to save other young lives is morally suspect." 391

With regard to intentional pregnancies, the starting point of the analysis is no longer at the point of fetal death. In the case of an unplanned pregnancy, the harm done to the fetus stems solely from its use for transplantation, and not from the abortion, because the abortion would occur regardless of the donation or sale of fetal tissue. However, in the

case of intentional pregnancies for the purposes of tissue procurement, the question that must be answered is whether the additional harm to the fetus that stems from its intentional creation for the purpose of being destroyed is sufficient to override the autonomous choice of the woman who chooses to undergo such a pregnancy. It must be noted that the alternative for these fetuses is not the chance to live. If intentional pregnancies for tissue procurement are banned, then the fetuses created and destroyed in this way would never be created.

Once again, the difficulty of reaching an assessment of the harm imposed on the fetus by such actions stems from the lack of consensus regarding the moral status of the fetus and the content of its interests. Robertson argues that "[i]n terms of fetal welfare, no greater harm occurs to the fetus conceived in order to be aborted, as long as the abortion occurs at a stage at which the fetus is insufficiently developed to experience harm, such as during the first trimester."392 The debate regarding the harm to the fetus is obviously difficult to resolve without a prior determination of the precise status of the fetus. It must be remembered, however, that this examination takes place within the context of a liberal autonomy framework that is hostile to restrictions on the autonomy of the primary parties to an exchange. Therefore, autonomy theorists would be opposed to the recognition of the fetus as an autonomous entity that could assert rights or interests of its own. From this point of view, therefore, the harm to the fetus from intentional creation and destruction would not be sufficient to justify a ban on this activity.

The concerns raised in this section are important to liberal autonomy theorists. Nevertheless, as we have seen, many of the problems associated with coercion and information failure can be resolved by regulating entitlements, the process of contracting, and the behaviour of the parties involved. The problems associated with intentional pregnancies for tissue procurement purposes are less susceptible to regulatory solutions. The potential for coercion appears significant in this context and difficult to avoid. In addition, the harm to the fetus, while difficult to specify precisely, might justify restrictions on such pregnancies from within the liberal autonomy framework. The combination of these two internal constraints of coercion and harm to third parties may make the use of restrictions more palatable to the liberal autonomy theorist.

## (C) Utilitarian/Efficiency Theories

We now turn to an application of the utilitarian and efficiency theories. Rather than focussing on the enhancement of the autonomy of the parties to an exchange of fetal tissue, utilitarian theories focus on their "welfare," and the welfare of others affected by such transactions. A utilitarian analysis of the desirability of a market in fetal tissue requires an analysis of the consequences of allowing market transactions for the parties involved, third parties affected by the presence of a market, and society in general. As we have already seen, the measurement and determinacy

problems associated with this utilitarian calculus are significant, especially given the large number of parties arguably affected by the prospect of commercial (or even non-commercial) exchanges of fetal tissue. The two economic variants of utilitarianism, Pareto and Kaldor-Hicks efficiency, are an attempt to mitigate some of these measurement and determinacy problems.

### (a) The Pareto Model

A Pareto analysis of exchanges of fetal tissue implicates concerns very similar to those raised in the preceding section in the context of liberal autonomy theories. The Pareto model requires an evaluation of the effect of the exchange of fetal tissue on the welfare of the parties as they themselves would measure it. For an exchange to be Pareto-superior and therefore desirable, it must make at least one of the parties to the exchange better off, and the exchange must not render worse off any other persons affected by it, with the current state of affairs as the baseline. If these requirements are satisfied, the exchange is said to be Pareto-superior.

As we have already seen in Part 3, the determination of whether an exchange can be said to be Pareto-superior requires an examination of the issues of voluntariness, information adequacy, and externalities. The similarity to the previous liberal autonomy discussion is apparent.

To have the potential to be Pareto efficient, exchanges of fetal tissue must make either demanders or suppliers better off, and neither worse off. In general, potential recipients of fetal tissue will be rendered better off by the presence of a market in this resource, 393 because the supply of fetal tissue will be increased, and potential recipients will have a greater opportunity to purchase this possibly life-saving material. It is clear that those who are able to and do enter into such transactions will consider themselves better off, as they have decided the fetal tissue is of such value to them they are willing to pay for it. However, there is one caveat to the generally positive effects on demanders of a market. As has been noted in the context of a commercial blood supply, 394 fetuses that have been purchased rather than donated may be of significantly lower quality.

[T]he poorest or most desperate members of society are more likely to conceive and abort for profit. Since these women are often unable to afford sufficient health care and nutrition, purchased fetal tissue could be of a lesser quality than tissue donated by the general public. $^{395}$ 

Therefore, to render potential recipients better off, market transactions in fetal tissue may have to be subjected to (expensive) screening procedures and quality control.

The possibility of differential pricing of fetal tissue has not been the subject of commentary. If histocompatibility becomes advantageous for certain types of transplants, it is obvious that demanders will be willing to pay more for tissue that is compatible. This would be of benefit to such

demanders because they would avoid the need for expensive and possibly risky immunosuppressive drugs.

Turning to the supply side, women who choose to sell their fetal tissue could be presumed to experience increases in their subjective welfare, in the absence of evidence that they have experienced coercion or were insufficiently informed before deciding to enter into the transaction. 396

However, whether a market in fetal tissue is Pareto efficient cannot be determined without an examination of the externalities entailed in such a market. The liberal autonomy notion of harm is closely related to the concept of externalities. Apart from the fetus, there are other interests that may be "worse off" as a result of market transactions in fetal tissue, at least relative to alternatives. For instance, one subgroup of potential recipients may consider themselves worse off if a market in fetal tissue develops. Those who do not have the financial resources to purchase fetal tissue at market-determined prices may well prefer an alternate system of allocation of fetal tissue, e.g., a lottery, queue, merit, or medical suitability. These demanders will be prejudiced by a market that denies them the possibility of obtaining such a life-saving resource. Moreover, if differential pricing were to become a reality, those demanders with rare compatibility matches might be made worse off by a market allocation scheme in which fetal tissue with such rare attributes would be very highly valued than they would under an administrative allocation system. However, from a Paretoefficiency perspective, limiting access to a new resource through market allocation does not render those without sufficient financial resources worse off, because their position must be compared not with an alternate system of allocation, but rather with the situation prevailing before the introduction of the new resource into the market when it was not available to anyone. The nature of the resource in this case is the problematic feature. Arguably, in the absence of a market, there will be a (more limited) supply of fetal tissue available even to impoverished demanders. If this argument is accepted, Pareto-efficiency theory appears to suggest that markets in fetal tissue should be permitted. Market exchanges of fetal tissue have the potential to render both suppliers and demanders better off in terms of their own subjective welfare evaluation. The possibility of harm to the fetus would probably not be regarded by Pareto-efficiency theorists as a salient externality. As noted in earlier sections, the problem of disutility to third party "moral" interests is more problematic.

(b) Kaldor-Hicks Efficiency and Utilitarianism: Cost-Benefit Analysis

The concept of Kaldor-Hicks efficiency is an attempt to perform the utilitarian calculus using willingness to pay as a measure, thus attempting to avoid some of the measurement problems associated with the comparison of utilities. The Kaldor-Hicks theorist would examine the theoretical willingness of those who are better off as a result of a market in fetal tissue to compensate those who are worse off so as to make this latter group indifferent to the presence of such a market. Once again, however,

problems of measurement seem formidable, if not insurmountable. In spite of the problems associated with both the conventional utilitarian calculus and the Kaldor-Hicks approach, an attempt to catalogue the costs and benefits that would have to be measured may prove valuable.

"A purely utilitarian analysis ... would necessarily take into consideration the immeasurable benefit to the recipient of the transplant who is stricken with a previously incurable ailment and provided with a newly-found potential for recovery." Other benefits that would have to be considered include autonomy enhancement for the woman who chooses to sell her fetal tissue, and welfare increases for herself and perhaps also for her family as a result of the concomitant increase in wealth. In addition, the welfare of the recipient's family and friends would be increased as a result of the improvement in the recipient's health. Society in general would benefit from "the acquired knowledge and foundation for further research." The financial benefits enjoyed by for-profit tissue processing companies would also be included in the calculation.

On the cost side, many would argue that society would be severely harmed by markets in human fetal tissue. As will be discussed below, some commentators believe that even the possibility of transplants from donated fetal tissue will legitimate and encourage abortion, a practice that they find morally abhorrent. Moreover, as previously discussed, many argue that fetal tissue transplants cause significant harm to the fetus. In the case of intentional conception for fetal tissue procurement purposes, some argue that this practice devalues human life and its dignity. The cost to demanders of purchasing fetal tissue under a market scheme would also have to be included in the calculus, as would the physical risks to women associated with intentional pregnancies for procurement purposes. Further, the cost of proliferation of the accompanying technologies would have to enter into the calculation.

The calculus can never be completed. The impossibility of comparing such wildly diverse costs and benefits is overwhelming. How much weight should be accorded to each of the interests involved is an extremely difficult question. If we shift to the Kaldor-Hicks framework of analysis, the questions do not become any easier to resolve. Demanders of fetal tissue transplants would no doubt be "willing to pay" vast amounts of money to procure the tissue that has the potential to save their lives. But when we consider the possible harm to the fetus in this context, the framework falls apart: how can we speak meaningfully of the amount of money that a fetus would be willing to pay to forestall a market in fetal tissue?

Nevertheless, the utilitarian analysis does serve to illustrate one of the important distinctions between the sale of tissue from unplanned pregnancies that are aborted, and the sale of tissue from abortions of pregnancies intentionally conceived for tissue procurement purposes. The costs borne by the supplier in these two cases are radically different. In the latter case, greater risks are involved for the women undergoing pregnancy and abortion. While the physical changes undergone by women in the two

situations are identical, only in the latter case are the risks of pregnancy and abortion related to the tissue procurement. (This is analogous to the difference between "spare" and *de novo* situations in the gamete and preembryo contexts.) For this reason, it is unlikely that intentional pregnancies for tissue procurement, which are costlier, will be in demand unless the supply of fetal tissue from abortions of unplanned pregnancies proves insufficient in either quantity or quality.

Utilitarian analysis also provides an important insight into the design of a regulatory scheme for fetal tissue procurement and distribution. The interests and utilities of all affected parties must be considered with respect to these two distinct methods of tissue procurement.

### (D) Distributive Justice Theories

Distributive justice theories mandate a focus on individual equality of opportunity and access to resources as these pertain to the distribution of costs and benefits within society. The impact of the commodification of fetal tissue on the disadvantaged in our society must be examined. Distributive justice theorists suggest that "the sale of fetal tissue would result in transplant operations being available only to the rich who in turn would rely on fetal tissue from the poor. A society where the poor are the suppliers of fetal tissue and the rich are the beneficiaries" violates important principles of equality. 400

On the supply side, the distributive justice theorist would be concerned with the socioeconomic class of women who would be potential suppliers if a market in fetal tissue were to be permitted. Those most likely to conceive for the purposes of aborting and selling their fetal tissue are undoubtedly lower-income women without other alternative means of earning money.<sup>401</sup>

Just as economically less advantaged women are more likely to be surrogate mothers for economically advantaged infertile couples, so might economically disadvantaged women be the main source of fetal tissue available for sale to others. In light of socioeconomic differences, the possibilities for exploitation are extended: what may be mere reimbursement for a middle class person amounts to real income for a poor person. 402

As Titmuss argued in the context of opposition to a commercial system of blood procurement, 403 offering material incentives to impoverished women to donate fetal tissue would provide an incentive for those women to take unnecessary health risks: impoverished suppliers might attempt to conceive and abort too frequently, endangering their physical well-being. 404 The potential for exploitation of impoverished women in this way does not necessarily suggest that a market in fetal tissue would be distributionally unjust with respect to suppliers. "If we think respect for persons warrants prohibiting a mother from selling something personal to obtain food for her starving children, we do not respect her personhood more by forcing her to let them starve instead." By banning the commodification of certain

personal attributes or resources, we may be harming those who are most in need of the money that can be realized from such sales. 406 Conversely, it could be argued that inviting disadvantaged persons to "buy" their way out of poverty by conceiving and aborting fetuses in order to sell them is not distributively just. The dilemma of denying an impoverished person an immediate option for relieving her poverty is an illustration of Radin's "double bind." According to Radin, the only distributionally just solution to the double bind would be a "large-scale redistribution of wealth and power that seems highly improbable." In the absence of an immediate wealth redistribution, a transitional solution must be found.

In favour of commodification, one could argue that banning the sale of fetal tissue without providing an alternative to the impoverished women who may seek to supply fetal tissue would exacerbate their condition of poverty and deny their autonomous choices. In a freely competitive market, however, the price received by suppliers for their fetal tissue may be close to the costs incurred by them to produce it. Thus, the distributive justice theorist may decide that the greater evil of the double bind is that of exploitation (since permitting sales does not hold out a possibility of significant improvements in the financial condition of the suppliers). Again. the concern is that a market in fetal tissue will result in the exploitation of women who will be pressured "by economic need to become fetal factories," even though the payment offered may be only slightly above opportunity cost. 408 One solution might be to permit a highly regulated market on the supply side that would allow minimal payments to suppliers, so that impoverished women would not be faced with financial inducements to conceive for tissue procurement purposes. The payment would be noninducing because it would be set below opportunity cost. Women who were pregnant and desirous of terminating the pregnancy would be able to receive a small money payment if they decided to donate the fetal tissue for research or therapeutic use. 409

On the demand side, at worst, one could envision a bidding war to acquire desperately needed fetal tissue among vulnerable victims of diseases such as Parkinson's. One criticism of a market system that has been made in this regard is that "a humane society simply cannot and should not tolerate the use of the ability to pay as a mechanism for allocating scarce medical resources." It must be acknowledged that some kind of distributional mechanism must be adopted regardless of whether a market for fetal tissue is to be permitted on the supply side. Nevertheless, it is possible to reject wealth as a criterion for determining who should receive transplants, without deciding which alternative method should be adopted. If a market were to flourish on the demand side, "[p]urchased fetal tissue would go to the highest bidder instead of to the individual who most needs the transplant to survive."

In conditions of scarcity, if an entirely free market were to be permitted, the recipients of fetal tissue would be those who are relatively well off, and able to afford the high price of the tissue. As noted above, if differential pricing were to become an issue, those poorer persons who required rare tissue (because of rare compatibility requirements) would be at a distinct disadvantage as such tissue would be exceedingly scarce and therefore very expensive.

A prohibition on the designation of the tissue recipient would avoid the distributional inequities inherent in a system where the donor may choose the transplant recipient (who would likely be the highest bidder). "Designating recipients is ... generally held to be undesirable, for reasons of justice and fairness." Apart from the issue of payment, distributive justice theorists would advocate a prohibition on recipient designation in order to ensure equality of opportunity amongst people of different family situations: persons with families and friends who could donate tissue, and persons without such resources, would have equal opportunity to access any donated tissue.

For the distributive justice theorist, the most appropriate solution would be to heavily regulate the demand side of the market through the health care system. As potential recipients of fetal tissue transplants would be drawn from all economic levels of society, allocation through the health care system based on medical need, compatibility, and, possibly, a queuing procedure would avoid the prospect of a bidding war and allow demanders equal access to this life-saving or significantly life-enhancing resource. To help subsidize this system, demanders with financial means could be required to pay some portion of the cost of the technology based on a sliding scale that would be a function of the wealth of the patient. Alternatively, the health care system could fully subsidize the use of fetal tissue.

### (E) Essentialist Theories

Essentialist theorists are concerned with the effects of fetal tissue use on the core values of society, and on the members of particular groups within society.

## (a) Religious Theories

The Catholic Church is strongly opposed to elective abortion. <sup>413</sup> While abortions to save the life of the mother are generally accepted by Catholics, Protestants, and Jews as ethically justified, <sup>414</sup> the supply of fetal tissue available from such abortions will likely fall far short of the demand. Reactions of these theorists to the use of tissue from *elective* abortions must therefore be considered.

In written testimony to the United States Fetal Tissue Transplantation Research Panel of the National Institutes of Health, the Bishops' Committee for Pro-life Activities of the National Conference of Catholic Bishops stated that

[i]t may not be wrong in principle for someone unconnected with an abortion to make use of a fetal organ from an unborn child who died as the result of an abortion; but it is difficult to see how this practice can be institutionalized [including arrangements to ensure informed consent]

without threatening a morally unacceptable collaboration with the abortion industry.  $^{\rm 415}$ 

The true concern raised, therefore, is one of complicity. As this is also at issue in the context of natural law theories, we will consider it in that context.

#### (b) Natural Law Theories

Natural law theorists argue that certain fundamental and immutable principles should govern the regulation of our society. Laws should be designed to advance certain objective goods, one of which is undoubtedly life and its protection.  $^{416}$ 

Therefore, ... any law which allows extermination at the expense of human life, *i.e.* abortion, would be contrary to the objective good and unacceptable under this theory of justice. To take the process a step further, the use of aborted fetal tissue would be contrary to the objective good of "life" because it, in a sense, legitimizes the abortion. 417

As this synopsis of the natural law position illustrates, many of the problems surrounding fetal tissue transplants stem from the issue's "inextricable embroilment in the abortion debate." The use of tissue and organs from cadavers for transplants is generally ethically accepted. Therefore, it is not simply abortion as the cause of fetal death that renders transplantation of fetal tissue contentious, since transplantation of tissue from spontaneous abortions is directly analogous to any other cadaver tissue transplantation, and appears to be morally justifiable. The aspect of fetal tissue transplantation that many natural law theorists find objectionable is the use of tissue stemming from a calculated decision to abort the pregnancy. The "key issue, therefore, is whether elective abortion, as the main means through which fetal tissue may be acquired, is morally separable from the therapeutic goal of neurologic [or other] regeneration for recipients."

The arguments made by natural law theorists are generally not centred on the issue of commodification, but rather reject fetal tissue transplantation at a more basic level regardless of whether the tissue is donated or

sold by the woman who undergoes an elective abortion.

Four main natural law arguments are made against the use of any tissue obtained from elective abortions: (1) users of fetal tissue are morally complicit in the abortion providing the tissue; (2) fetal tissue transplants result in societal legitimation of elective abortion; (3) fetal tissue transplants will encourage abortion; and (4) abortion of a fetus for the purpose of fetal tissue donation involves using the fetus as a means to another's ends. These arguments are premised upon the assertion that abortion is morally abhorrent. As Robertson notes, this premise is "not universally held in our pluralistic society." Robertson argues that if we reject this assertion, the arguments made against the use of fetal tissue in this context are unconvincing. However, even if we assume a moral abhorrence of abortion, a critique of the natural law arguments advanced may reveal that moral

abhorrence of elective abortion does not necessarily imply that using fetal tissue obtained from abortions for non-tissue procurement purposes is immoral.  $^{423}$  (By contrast, again assuming moral abhorrence of abortion, the force of the four arguments must be conceded with respect to intentional pregnancies for tissue procurement purposes.) We will concentrate here solely on the procurement of tissue from abortions of unplanned pregnancies.

### (i) Complicity in Abortion: Moral Taint

The premise  $\dots$  is that knowingly profiting from an evil done to others makes one a moral accomplice in the commission of that evil. If induced abortions are evil, transplanting fetal remains makes one morally complicitous in the evil that makes the transplant possible.

J.T. Burtchaell argues that by using fetal tissue derived from an elective abortion, the researcher or doctor is morally complicit with the abortionist. The type of complicity identified by Burtchaell is "the sort of association which implies and engenders approbation ... [It] is detectable when the associate's ability to condemn the activity atrophies." It is by using the abortionist as a "ready supplier of tissue from unborn humans who have been purposely destroyed" that the scientist becomes an accomplice or confederate. The scientist becomes an accomplice or confederate.

B. Freedman, in his response to Burtchaell, concedes that the absence of a causative link between the occurrence of an abortion and the therapeutic or experimental use of the fetal tissue derived therefrom is not fatal to a finding of moral complicity in an ongoing series of morally abhorrent acts, such as the use of a continuing supply of electively aborted fetuses. 428 Where Freedman finds Burtchaell's argument troubling is in the manner in which Burtchaell rejects the view that complicity requires a causative nexus (link). According to Burtchaell, there is no need for a causative element to find moral complicity as long as there is a direct (albeit later) benefit from the harmful behaviour of another. 429 Freedman demurs that if this were indeed the case, firefighters and their dependants and creditors would be complicit with the arsonist as they would indirectly benefit from the illegal acts of the arsonist. 430 Thus, in the absence of any involvement in the abortion itself (e.g., through a recommendation that the pregnancy be prolonged, or the abortion procedures altered), there is no complicity in the use of tissue obtained following an elective abortion. 431

Robertson's response to Burtchaell is similar to that of Freedman. Robertson holds that the fatal flaw in Burtchaell's account of moral complicity is his inability to recognize that scientists may use and derive a benefit from selectively aborted fetal tissue without approving of the abortion. That is, "they are not accomplices in the prior evil merely by seeking to achieve some good from a contingent event over which they had no control." 432

Burtchaell's subsequent rebuttal of this critique is interesting. While conceding that the actors involved may not in fact be either explicitly or

implicitly approving of the elective abortion that has produced the fetal tissue that they use, he describes their complicity as one of disregard:

When we become accomplices in good we do applaud the deeds of others. When we become accomplices in evil we do the opposite: we avert our gaze, we fend off knowledge, we fancy that deeds done carry no taint for those who arrange to benefit from them. But the complicity remains. The alleged moral separation between researcher and abortionist is as effective a moral barrier as the fence between the L.G. Farben plant and Auschwitz. 433

The problem with the concept of a complicity of disregard is that it is susceptible (as is the concept of a complicity of approval) to the argument that the use of organs from homicide victims makes neither the transplant doctor nor the recipient complicit in the murder that made those organs available. Such use does not imply approval of the homicide; 434 nor does it engender disregard of the murder, or diminish efforts by the parties who use the victim's organs to decrease the number of homicides. People who have benefitted in this way from a homicide do not view homicide as somehow less morally reprehensible, nor do they close their eyes to the horror of murders that occur in their society. As Burtchaell concedes, it is "a human estimate how close and operative complicity actually is." 435 Researchers and doctors using fetal tissue from elective abortions that did not occur for tissue-providing purposes may, for this reason, legitimately deny any complicitous taint, because there is sufficient dissociation between the abortion and the research or therapeutic use made of its product (especially given that the abortion will occur whether doctors choose to use the tissue to help others who are very ill, or whether they choose to have the abortuses destroyed). 436

The complicity claim is distinctive by virtue of its non-consequentialist nature. Unlike the other arguments by natural law theorists and antiabortion proponents (to be discussed below), "it focuses on the corruption of the agent apart from any further consequences, in this case, additional abortions." The other arguments are consequentialist in that they focus on certain allegedly negative consequences that may be entailed by the use of fetal tissue for research or therapy. These consequences include influencing public opinion about abortion and thereby causing societal legitimation of abortion, providing inducements to abort resulting in an increase in the number of abortions, and use of the fetus as a means to another's ends.

(ii) Influencing Public Opinion About Abortion: Societal Legitimation of Abortion

Those who consider abortion to be morally abhorrent assert that fetal tissue transplants

will make abortion less morally offensive and more easily tolerated both for individual pregnant women and for society. Those who object believe the result will be to so dilute the perceived immorality and undesirability

of abortion as to transform it into a morally positive act. This will encourage abortions that would not otherwise occur, and dilute support for reversing the legal acceptability of abortion, in effect creating complicity in future abortions.  $^{438}$ 

Robertson takes issue with the claim that the possibility of donating fetal tissue would change a society's decision as to whether or not to make abortion illegal. He argues that the abortion debate is centred around the moral status of the embryo and fetus, and a majoritarian determination of fetal personhood would not be affected by possible "secondary benefits" of abortions such as fetal tissue transplants. 439

A different response to this argument is a refusal to respond to it in moral terms. Some commentators have asserted that the societal legitimation argument is fundamentally political, in that its purpose is to influence public opinion about abortion. In the absence of agreement "about the ethical or moral nature of abortion, one group's attempt to enhance its political position should not justify a total ban on a life-saving technology." This response may be somewhat facile, because the characterization of the argument as political or moral is dependent upon which side of the argument one is on. Nevertheless, its political nature must be acknowledged. To G.J. Annas and S. Ellis, this is crucial:

The primary objection to the use of fetal tissues from elective abortions appears to be a political one: if it were therapeutically successful, such use would create a new constituency — sick people who would benefit from such transplants, and their families — that would be opposed to the prohibition of elective abortion.<sup>441</sup>

In contrast, Freedman argues that while the debate surrounding abortion occurs in the political arena, it is essentially a moral issue and must be treated as such. "Thus, the 'politics' of abortion cannot be separated from the moral dimensions and must not be excluded from relevant consensual ethical deliberation, as will inevitably arise in discussing the use of fetal tissue from procured abortions."

The true force of the social legitimation of abortion argument is unknown in the absence of empirical evidence to indicate that fetal tissue transplantation has affected society's moral perception of abortion. This evidence will not be available until the technology becomes more widespread. No doubt the interpretations of any such evidence will be highly contested.

## (iii) Creating an Inducement to Abort

Natural law proponents consider abortion to be morally abhorrent. It is therefore evident that, if the availability of fetal tissue transplantation encourages women to choose abortion, and thereby increases the number of abortions performed, natural law proponents would reject fetal tissue transplants. Whether fetal tissue transplantation would provide an inducement to abort must be considered in each of three different scenarios: abortions of unplanned pregnancies, abortions of planned pregnancies that

were intended to be carried to term, and intentional pregnancies conceived and aborted for tissue procurement purposes.

It must be conceded that in conditions of scarcity the possibility of donating or selling fetal tissue for transplantation may induce women to become pregnant to procure fetal tissue for donation or sale. This point further buttresses the natural law demand for a ban on intentional pregnancies for tissue procurement purposes. It is less clear that the use of fetal tissue for transplantation would act as an inducement to women undecided as to whether to terminate their pregnancy. The force of this argument depends on whether the supply of fetal tissue from elective abortions of unplanned pregnancies for reasons unrelated to tissue procurement will be sufficient to satisfy the potential demand for it. We will assume, for the sake of argument, that conditions of scarcity do exist.

J.F. Childress identifies three potential incentives for abortion in the fetal tissue context. While the first two can be avoided by regulatory safeguards, the third is harder to dismiss and "remains speculative." First, the incentive of financial gain may increase the number of abortions if women are allowed to receive payment for their fetal tissue. Impoverished women who become pregnant may be induced to abort by the prospect of financial rewards. Natural law proponents would therefore support a ban on payments to women for their fetal tissue in order to eliminate the financial incentive to abort. 446

Second, the motivation of benevolence or altruism directed toward specific persons may encourage abortions that would not otherwise have taken place. This incentive is of far greater significance with respect to intentional pregnancies and abortions for donation to specific individuals. Nevertheless, women who are pregnant unintentionally or for purposes unrelated to fetal tissue procurement might decide or be persuaded to abort to donate tissue to a family member or friend who is desperately ill and in need of such tissue. A prohibition on recipient designation would avoid any such incentive.

The third incentive argument concerns general altruism (i.e., the knowledge that fetal tissue may benefit someone unknown to the potential donor). This knowledge is unlikely to influence women to become pregnant for the purpose of aborting and donating fetal tissue. Where the pregnancy is unplanned and unconnected to any desire to create fetal tissue for transplant purposes, it is difficult to argue convincingly that knowledge of possible beneficial uses of such tissue will play a significant role in the decision to terminate the pregnancy. For example, the U.S. *Report* of the Human Fetal Tissue Transplantation Research Panel notes that "the reasons for terminating a pregnancy are complex, varied, and deeply personal" and that it is "highly unlikely that a woman would be encouraged to make this decision [to abort] because of the knowledge that the fetal remains might be used in research." Because neither side of the debate can produce empirical evidence regarding the impact of such knowledge, "the debate hinges on speculation, often shaped by sexist perspectives, about

women's abortion decisions, and on answers to the moral question about which way society should err in such a situation of doubt."

Opponents of abortion argue that women who are ambivalent about abortion will be able to rationalize the decision to abort by telling themselves that they are aiding others. However, the Stanford University Medical Center Committee on Ethics, in its "Special Report" on the ethical use of fetal tissue in medicine, discredits this argument: the committee held that "in the light of the deeply personal and powerful physical, emotional, economic, and religious concerns of women considering abortions, it seems implausible that this knowledge would have any marked effect." An analogy with the organs of persons who have committed suicide is appropriate: society's failure to outlaw the use of such organs indicates a social recognition that important, difficult, and personal decisions regarding the termination of one's life are unlikely to be determined by a potential secondary benefit to another. If this is recognized in the context of suicide, it could also apply to the abortion and fetal tissue context.

Despite the difficulties inherent in determining whether any one motive is a necessary and/or sufficient condition in a woman's decision to abort, it would seem apparent that a woman's consideration of the burdens of an unwanted pregnancy would overshadow the influence of general altruism. It is probably impossible to devise a procedural safeguard to eliminate any possibility that general altruism could be a decisive factor in the decision to abort, but it could be argued that this risk is slight, and is worth taking. Other risks — which are (arguably) far more serious — are undertaken every time we decide how high to set safety standards for products, or how high to set speed limits for vehicles. 452

## (iv) Treating the Fetus as a Means to an End

An additional argument made by natural law proponents from a deontological perspective is that people must not be used as a means to an end, however favourable the end may be. This argument is significantly more powerful in the intentional pregnancy context than in the case of abortions for reasons unrelated to tissue procurement: in the latter instance, it may be argued that the fetus will die regardless of the decision whether or not to donate or sell fetal tissue. The pivotal distinction between intentional pregnancies for donation purposes and abortions of unplanned pregnancies with subsequent fetal tissue donation or sale is the element of intention. The argument that the end does not justify the means is not applicable to all types of fetal tissue donation, but does apply to intentional pregnancies for donation. That is,

the end does not justify the means ... because the individual who knowingly and freely pursues a specific end, also (knowingly and freely) chooses the means to its fulfillment. In other words, intention is crucial to the moral relevance of the relationship. $^{455}$ 

Therefore, intentional pregnancies for fetal tissue donation or sale, termination of an unplanned pregnancy motivated primarily by a desire to

donate or sell, 456 and encouragement of another to undergo an abortion for the purpose of donation or sale are all actions where the individual intends the means (the abortion) and the end (fetal tissue donation) and is thereby responsible for them. 457 The motivation for such actions may vary, from purely altruistic, to mixed, to self-interested; however, the element of intention remains present regardless of the motivation. 458 Natural law theorists argue that in these cases, the end cannot justify the means, and such actions should be condemned.

The discussion of complicity in the context of abortions of unplanned pregnancies with subsequent tissue donation suggests that in those situations, "the individual who intends to use the tissue in no way intends the abortion through which the tissue becomes available." Childress argues that where the means are not intended by the user, the abortion does not have to be justified by the subsequent therapeutic use of the fetal tissue to be ethically acceptable.

Additional elective abortions [of unplanned pregnancies] do not constitute a *means* to the *end* of HFTTR [human fetal tissue transplantation research]. At most they are a possible *consequence* of the use of HFTTR. $^{460}$ 

In fact, with regard to abortions of unplanned pregnancies, it may be ethically unacceptable not to make good use of fetal tissue, considering that the only alternative is to dispose of it summarily.<sup>461</sup>

### (v) Commodification

A further natural law objection focusses solely on the issue of commodification. "[S]ome ethicists condemn [commodification] because they believe it shows disrespect for the sanctity of human life. These ethicists fear that people will suffer subtle, psychological harm if society begins to regard body parts as commodities for trade." M.B. Mahowald writes that "[t]o construe human organs or tissue, even during the fetal stage, as property suggests a devaluing of what is human." The argument that commodification violates the fundamental principle of respect for life is even more persuasive with respect to fetal tissue than in the organ transplant context because of the fetus's potential to become a human being.

Some natural law theorists might possibly be content with a regime allowing fetal tissue transplants solely in cases where no financial inducements were offered to the supplier, and where the recipient was not designated by that supplier. These two conditions would avoid the prospect of intentional pregnancies for tissue procurement purposes. However, even under such circumstances, most natural law theorists would likely remain convinced of the merits of their complicity argument and would be unlikely to find the aforementioned constraints sufficient.

## (c) Conservative Communitarian Theories

This strain of communitarianism focusses on the need to enforce social morals to avoid the disintegration of society. Lord Devlin, the most famous proponent of this view, argued that

society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.<sup>464</sup>

According to Lord Devlin, the law must preserve social stability by upholding moral consensus, where consensus can be found. The problem, therefore, is to determine whether moral consensus has emerged, and to define its content. It is interesting to note that even Lord Devlin recognized that there were problems with the statutory prohibition on abortion in force in England at the time of his writings. He noted that the deleterious effects of an abortion law, such as illegal and dangerous abortions, illustrated "what happens to the law in matters of morality about which the community as a whole is not deeply imbued with a sense of sin; the law sags under a weight which it is not constructed to bear and may become permanently warped." No doubt the lack of a social consensus about the morality of abortion will hamper efforts to ascertain whether such a consensus exists with regard to fetal tissue transplants; many of the moral objections to fetal tissue transplants stem from the source of the fetal tissue, which is usually elective abortions.

Some commentators have considered the applicability of Devlin's perspective to the fetal tissue context. For example, one commentator asserts that moral majoritarianism is unhelpful in this context "because there is no clearly defined public sentiment regarding the appropriate use of fetal tissue obtained either through spontaneous abortions or as a result of pregnancies conceived for abortion purposes."466 With respect to the latter method of procuring fetal tissue, it appears that almost all commentators condemn such actions as immoral. 467 Similarly, there does appear to be an indication of consensus with regard to the commodification of fetal tissue. "Unanimity does not exist, but at least among researchers currently active in the field, a strong consensus exists that the fetal material must be donated."468 One commentator has argued along these lines that "[a]ny commercial trade ... threatens to undermine the respect for life and things human that holds our society together."469 Nevertheless, we cannot necessarily infer a consensus among members of the general public from the possible existence of a consensus among researchers or commentators. This illustrates one of the fundamental problems associated with moral majoritarianism analysis.

Other critics in the same vein as Lord Devlin predict a possible societal collapse if the technology is allowed to proceed, and argue that societal

moral consensus is required on this issue. These critics employ a "flood-gates" argument and

articulate dark fears that the technology could trigger the start of a "brave new world" in which one generation rejuvenates itself with fresh tissue from the next. In response, proponents of the technology point out that many life-saving medical breakthroughs, such as blood transfusions and heart transplants, met similar resistance. Predictors of such dire consequences, they contend, simplistically seek to avoid the complexities that biotechnology creates.<sup>470</sup>

A related argument is the "slippery slope" claim: this rests on the premise that society will be unable to place limits on the technology once it is unleashed. Other critics have found this argument unconvincing in the absence of "evidence about the likelihood that judgment and control will be exercised responsibly."

Some final comments on communitarian theories are in order. As noted in Part 3, modern communitarian theories criticize liberal theories for their impoverished view of the atomistic individual.<sup>472</sup> problems associated with the modern communitarian position are serious. In a heterogeneous society, where views on abortion and the use of fetal tissue vary dramatically, there is a risk that the majority could impose its conception of the "common good" on a minority that holds radically different views of the "good life." While the desirability of community is convincingly asserted by writers such as Sandel, the dangers of a "tyranny of the majority" are particularly formidable in the fetal tissue context. Liberal theorists (as we have seen) would respond that individuals should be permitted to make their own decisions about supplying or receiving fetal tissue for research or therapeutic purposes: persons who disapprove should not be permitted to "impose" their preferences on those who disagree. The tension between liberal and communitarian theorists in this context seems particularly unamenable to resolution.

## (F) Radical Contingency Theories

### (a) General

Contingency theorists regard preferences as socially constructed. One important contingency argument is that demand is not endogenous, but rather is socially constructed (exogenous). This argument is central in the context of technologies for the production of children, but it is less convincing in the fetal tissue context, given that fetal tissue is a potentially life-saving resource. Nevertheless, some contingency feminists do argue that the use of fetal tissue for research and therapeutic purposes is vulnerable to social construction: for example, Janice Raymond has argued that the evidence available regarding the medical success of fetal tissue transplants is unconvincing. Anymond describes the use of fetal tissue as follows:

Fetal tissue is becoming increasingly important to all sorts of high-tech medical research — to what I call "Rambo" medicine. Rambo medicine is based on male heroic technical prowess that requires more high tech, more high drama, more high publicity, more high funding, and more high risk for more women, with little immediate success — but of course, the *promise* of it. Rambo medicine, like messianic religion, is always promising a future that is yet unrealized. Rambo medicine is a medical eschatology of things to come. 474

It must be noted that research, experimentation, and technology associated with the use of fetal tissue could potentially be very costly, and could place strain on health care budgets to the detriment of other necessary health care resources and services. Radical contingency theorists rightly caution us not to become so enamoured of the possibilities for fetal tissue transplantation that we neglect to attend to the social costs of these procedures and their likelihood of success.

#### (b) Feminism

Many feminist critics argue that both donation and sale of fetal tissue objectify the woman involved. For example, Raymond argues from a feminist viewpoint that women who donate fetal tissue are being

used as fetal tissue banks. Feminists have pointed out the increasing tendency of the medical profession — especially in the area of the new reproductive technologies — to treat the fetus as a patient while minimizing the woman and making her into a mere environment for the fetus ... Fetal tissue transplants make women into incubators of lifesaving tissue. Seen in the wider context of the new reproductive procedures in which women are being cast in the role of medical vehicles for all sorts of "miracle" technologies, fetal tissue transplants reinforce the woman as container. 476

Even if payment is banned, the mere fact of procuring fetal tissue for therapeutic purposes perpetuates the depiction of a woman as a "reproductive conduit," and reinforces that reality. <sup>477</sup> In other words, the woman is seen as someone through whom something, or someone (depending on one's view of the status of the fetus), passes. The woman is not a "donor"; rather, she is a "source" of eggs, or fetal tissue, or babies. While these arguments are less persuasive in the context of an abortion of an unplanned pregnancy for reasons unrelated to tissue procurement, fetal tissue donation or sale in the context of abortions for tissue procurement purposes could

reinforc[e] the perception and use of women as a breeder class and reinforces the gender inequality of women as a group. This is not symbolic or intangible but strikes at the core of what a society allows women to be and become. Taking the commerce out ... but leaving the practice intact on a noncommercial ... basis glosses over that essential violation.<sup>478</sup>

This argument implies that *any* type of fetal tissue procurement in the context of abortions for tissue procurement purposes causes harm to women and further contributes to and even celebrates their condition of inequality and subordination.

Another feminist argument made with specific regard to the exogeneity of preferences focusses on social expectations and the social construction of women's altruism. Altruism is influenced by "the relationships set up, social and economic, between the system and the donor."

These relationships are "strongly determined by the values and cultural orientations permeating the donor system and the society in general."

Raymond argues that society's "unexamined acceptance of women as reproductive gift givers is very much related to a longstanding patriarchal tradition of giving women away in other cultural contexts — for sex and in marriage, for example."

Choices to donate fetal tissue are made "within the context of a culture and tradition that orients [women] to give and give of themselves."

Raymond describes a "moral celebration of women's altruism" that has blocked the move toward women's self-awareness and self-determination.

[Altruism] has been an instrument structuring social organization and patterns of relationship in women's lives. The social relations set up by altruism and the giving of self have been among the most powerful forces that bind women to cultural roles and expectations. The issue is not whether altruism can have any positive content in the lives of women, but rather that we cannot abstract this question from the gender-specific and gender-unequal situation of cultural values and structures in which new reproductive practices are arranged.<sup>484</sup>

The merits of encouraging donation of fetal tissue must be "assessed within a context of political inequality, lest it help dignify inequality." 485

But while the above-noted arguments are highly critical of women's "choice" to participate in supplying fetal tissue, they do not necessarily mandate an absolute ban. They do require, at a minimum, avoiding the inducement of pregnancies for tissue-procuring purposes, and regarding women's apparent "altruism" in the fetal tissue context with a degree of circumspection. Contingency theorists remind us that rejecting the values of the free market and advocating altruism as a substitute can have serious implications for women, given the social, historical, and political context in which we live.

# Part 5. The Governing Principles

## I Introduction

Both as individuals and as a community, we do not operate within a one-value view of the world. Most of us simultaneously espouse efficiency, distributive justice, relational, and probably other values. The task that we

confront, as individuals and as citizens, is how to reconcile, or weight, these values in particular contexts. While we do not pretend to be able to offer a meta-theory that weights these values in some general social welfare function, in the particular context of the commercialization of reproductive materials and services we believe that there are elements in each of the major normative perspectives reviewed above that justify recognition in a normatively defensible and coherent legal framework for regulating this class of activity. This is not to claim that these perspectives can be reconciled in all major respects, or that a compromise among them can best be justified as a necessary evil in order to secure some minimum necessary level of political consensus to support some set of public policies. While it may be true that a compromise will secure the necessary political consensus, we claim that on normative grounds a number of the critical values represented in these perspectives will properly inform the choice of public policies in this context. We make no apologies for this form of "moral pluralism": it is not unprincipled to optimize across a set of values, all of which, to a greater or lesser extent, legitimately evoke our allegiance.

From liberal autonomy, we acknowledge the concern that individuals on both the supply and demand sides should have a significant range of choices about the exchange and use of reproductive and fetal material and gestational services. We also accept that both suppliers and demanders ought to be provided with all relevant information about the physiological and psychological risks involved in these exchanges.

From the application of Pareto-efficiency theory, we recognize that a distinction can be made (in the gamete, pre-embryo, and fetal tissue contexts) between exchanges following *de novo* procedures, which are more likely to leave one party worse off, and situations involving spares, where this is less likely to be true. Kaldor-Hicks efficiency (utilitarianism) draws our attention to the large number of parties affected by all transactions involving the exchange of reproductive materials and services. The interests of all these parties must be taken into account. Utilitarianism also reveals that research interests in the gamete, pre-embryo, and fetal material context are important because they have the potential to benefit all of society. One other significant insight is the recognition that prevention of infertility may be far less costly (in terms of psychological pain, health risks, and social resources) than use of the new reproductive technologies.

From the essentialist and contingency theorists we adopt the idea that reproductive material and services, and fetal material, have significant personal and moral connotations, for both the individual and the collectivity. We acknowledge the feminist concern that demanders explore alternate ways to share themselves with others, so that we, as a society, will not focus excessively on promoting the production of children and women's role in that process. We also accept the contingency theorists' argument that the demand for reproductive material must not be taken as "given" — it is inappropriate to assume that simply because a demand

exists, supply must be increased to meet it. When it is possible that demanders (particularly women) are subject to strong social pressures to have children, and when, on the supply side, suppliers face psychological and physiological risks, and technologies are costly, it seems reasonable to consider ways to reduce demand, rather than simply promote an increase in supply.

Like distributive justice theorists, we recognize the serious possibility that supply-side inducement effects, differential pricing, and demand-side discrimination might prejudice the lot of disadvantaged persons. Given contingency and essentialist concerns about the personal significance of reproductive material, these disproportionate effects seem particularly serious. We also note the cost of the technologies, and their potential to draw resources away from other pressing social needs, should commodification become widespread.

It is apparent that among the major normative perspectives there are significant areas of agreement (e.g., feminists would agree with autonomy theorists that single and lesbian women ought to have access to reproductive materials), and disagreement (e.g., autonomy theorists have no objection to financial inducements on the supply side, while distributive justice theorists might want payments limited). It is impossible for us to reconcile all the competing normative concerns within a single set of regulatory principles, and it is clear that the least moderate versions of each normative perspective would be very difficult to incorporate within a scheme that seeks out maximum common ground. While there is some degree of plasticity within the frameworks such that commonalities between seemingly conflicting perspectives may be found, at times values conflict so sharply that choices are unavoidable.

We propose to make these choices on the basis of the role that we believe commodification ought to play in the debate about the use of reproductive materials and services. It is our mandate to define a role for commodification, but commodification cannot be considered outside its current social context — and it is obvious that the debate around the use of reproductive materials is highly complex. There is a wide range of competing values, ethics, and convictions about use of supplied reproductive materials and services, and the experimental and therapeutic use of aborted fetuses. The concept of a "need" for reproductive material and technologies is also complex and contentious: while it is possible to argue that fetal material is "needed" as an (albeit experimental) part of a medical treatment, it is difficult to make the claim that reproductive material and gestational services are medically "needed," since infertility does not necessarily threaten the health and life of the individual or couple. The idea that reproductive material ought to be thought of as a medical treatment because the emotional distress of some infertile persons could be termed a psychological "need" is also controversial, since there is reason to suspect that "preferences" for genetically or gestationally related children may be in part socially contingent and constructed. In view of the profound personal,

moral, and ethical nature of these controversies, and the extent of disagreement, we hesitate to assign an active role to commodification. This means that, given the uncertainties, ambiguities, and controversy over the personal, moral, and social implications of use of materials and technologies, we are reluctant to use commodification to induce more individuals and couples to participate in the use of supplied materials and the technologies; at the same time, given the diversity of views, we hesitate to adopt measures that would drastically restrict or ban the exchange of materials.

Our solution is to isolate commodification from the controversy: to hold it constant, and allow the other variables — scientific data, morality, public opinion, and philosophical argument — to drive the debate. To this end, we would assign commodification a "neutral" role: we would refrain from using commodification to significantly increase the level of activity, but we would also decline to eliminate commodification altogether. (This is not to say that we would assign the state a neutral [i.e., uninvolved] role: the parameters of state involvement will be explored more thoroughly below.) We propose a regime of "constrained commodification" (defined in Part 1, and again below), intending it to have this effect: it would enable those who are resolved to donate or acquire materials and to use the technologies to do so, but it would not of itself (by means of financial inducements) encourage the participation of anyone who was not already motivated by other goals and values. The parameters of this "neutral," "constant," or "isolated" role for commodification are explored more fully as we set out the four principles that represent our attempt to synthesize the elements that we have chosen from the various normative perspectives. These four principles, and the accompanying role for commodification, will drive our proposals for regulatory regimes in Part 6.

## II The Four Principles

## (A) The Principle of Uniqueness

## (a) Blood and Kidneys

The first principle is that reproductive material and services are unique and must be regulated in a manner different from that which may be appropriate for other bodily materials, regenerative (e.g., blood) or non-regenerative (e.g., organs). The lack of analogies becomes apparent when one considers the difference between people's attitudes to blood and organ donation and their feelings about donation of reproductive material. For example, it is common for blood donors to sport a sticker in the shape of a drop of blood on their lapels following donation. But it is difficult to imagine men wearing a sperm sticker, or couples wearing matching preembryo stickers, following donation of reproductive material. Currently, sperm suppliers seem quite secretive: it is not a matter discussed in the workplace as is blood donation. Organ donations are also different: while a large percentage of citizens are willing to sign organ donation cards so

that their organs may be used after their death, many would feel differently about their ovaries being extracted and their ova used for the creation of 20 or 30 children, for example. Spouses and other family members might also feel disturbed at the thought of their partner's reproductive material being used to create children related to that partner but unrelated to themselves: these feelings would not be evoked at the donation of organs, such as kidneys.

### (b) The Personal Aspect

The traditional connection of reproductive material with sexuality usually thought of as a private and personal matter — is another factor in people's reluctance to treat reproductive material as they would organs or blood. Sociobiologists argue that all people, like animals, desire to bring offspring into the world to perpetuate their particular genetic material. 488 But the current shortage of sperm, ova, and pre-embryos calls this argument into question: the very reason that we might consider introducing commodification is to induce individuals to overcome their observed reluctance to part with their reproductive material. The reason that few individuals currently volunteer to donate, even when donation is painless and consumes a minimal amount of time (e.g., sperm donation, which is less painful and time-consuming than blood donation) and even when the material is already in existence (e.g., spare pre-embryo donation), can only be that people have strong personal feelings and moral beliefs about their own genetic material. Decisions about whether to assist in creating a unique new human being reflect a combination of emotions and strongly held intellectual, spiritual, and moral convictions.

Gestational services and fetal material have personal and unique aspects also. Gestational services are unlike other physical labour in that the fetus is developing within (and, importantly, in connection with) the woman's own body. The desire to experience pregnancy, and to know they have nourished the fetus and given birth to the child, may be reasons why some female demanders prefer to make use of supplied gametes and preembryos rather than to adopt. The presence of strong personal and moral convictions in the fetal tissue context is amply demonstrated by the powerful emotions and variety of opinions evoked by the abortion debate. Yet, despite the range of disagreement on the subject of abortion, we believe that most individuals would agree that the fetus is worthy of a degree of respect by virtue of its biological status as a genetically unique potential human life.

# (c) "Need" and Demand for Reproductive Material and Services

It is also clear that there are very real physiological and medical distinctions between the need for reproductive material and services and the need for blood and organ donation. Demanders of blood and organs often will die without them, but demanders of reproductive material and services are typically physically sound and are, in the case of reproductive material, more likely to continue to be healthy if they do not receive the

material they demand (i.e., to use materials demanders must assume medical risks). 489 While the psychological pain of some childless individuals may be significant, it is unlikely to be life-threatening, and some potential substitutes for a genetically or gestationally related child are available. 490 This distinction between urgent medical need for blood and organs and perceived psychological need for children requires that demand for reproductive materials be evaluated on its own merits, and not analogized to demand for other bodily materials. By contrast, the demand for fetal material *is* analogous to the demand for blood and organs, because fetal material may be necessary for the continuance of an existing human being's life.

## (B) The Principle of Enablement (Not Inducement)

## (a) Arguments For and Against Emphasizing Distributive Concerns

Given the deeply personal and controversial nature of reproductive materials and services, our second principle — premised on the fact that commodification has powerful incentive effects that disproportionately affect the disadvantaged — becomes especially important. Many theorists, not exclusively from the distributive justice perspective, argue, and we agree, that monetary inducements directed at overcoming strong convictions of a personal and moral nature are inappropriate, and become more so when it is the poor who will be disproportionately induced to participate. For example, Cass Sunstein argues that laws should properly reflect the majority's "preferences about preferences," or second-order preferences, at the expense of first-order preferences. This phenomenon — voluntary foreclosure of certain choices — is the political analogue of Ulysses and the Sirens. Such measures may be regarded as an effort by citizens to protect themselves against their own transitory and perhaps misguided choices; this is a kind of pre-commitment policy.

The counter-argument, made strongly by Posner — that the supply of reproductive materials and services would be only one more of many undesirable jobs filled by society's poor — is unconvincing. 493 argument underestimates the unique nature of this activity, and could also be used to justify the opposite conclusion — not imposing another undesirable burden on the already disadvantaged poor. Posner also argues that paying the poor to perform undesirable jobs is distributively just because it improves their lot in life by making them financially better off. 494 However, this argument fails to take into account the nature of the activity in question — it is admirable to improve the financial circumstances of the poor, but at what personal and moral cost to those persons? Other distasteful jobs that one might take on for financial motivations, e.g., janitorial services or garbage collection, are qualitatively different from the provision of genetic or fetal material or gestational services. It is also distasteful to many to imagine a society where poorer persons seeking to improve their lot in life are presented with a strong financial inducement to sell their reproductive material or services to wealthier persons. Clearly, it would be

preferable to at least attempt to extend to poorer persons a small part of the range of choices (including education, job skills training, employment opportunities, day-care, etc.) that are available to wealthier persons. If one were to adopt Posner's position, one could quite readily justify postponing structural modifications to society, such as the extension of the choices and opportunities outlined above, until the poor had exhausted income opportunities from their other natural endowments (their reproductive materials and capacities).

Another argument made by some feminists is, ironically, similar to the Posnerian argument, differing only in the conviction that it would be best, in an ideal world, if no one were to become a supplier. This line of argument holds that, since the supply of reproductive material and services is a bad job that, ideally, no one should need to accept, anyone who does so should be paid very well. 496 The paradox of this argument is apparent: high payment will induce more people to enter an activity that is already perceived to be undesirable. There is also a short-sighted quality to this argument: paying a subset of disadvantaged people to participate in undesirable activities may increase their income but diverts attention from the systemic inequalities in society and the labour market, factors that cause people to become and stay poor.

Turning to primarily demand-side issues, Posner's argument that in a system of unconstrained commodification more suppliers would enter the market and would compete down to (opportunity) cost, thereby making materials and services more financially accessible to poorer demanders, is also highly problematic. The market would generate differential pricing (such that materials and services produced by persons of different racial backgrounds and attributes would be priced differently), which could potentially alter the way that we as a society perceive and value our constituent members. Children produced from materials sold in such a market might also come to see themselves as more or less valuable than other children with different racial backgrounds and attributes. This type of market would also offer a disproportionate share of the increased selection of materials and services to wealthier demanders who could afford to pay for the more highly demanded (and accordingly more expensive) materials and services. Moreover, any benefits that wealthy and moderately less wealthy demanders would derive from an increased amount of materials and services on the market would entail emotional or psychological hardship for poorer suppliers, who would have been financially induced to overcome their moral reluctance to participate in these exchanges. Finally, a subset of poorer demanders would be excluded from participation because they lack the resources to pay market prices, even when these prices are close to cost. The benefit that the less advantaged would derive from a system whereby wealthier demanders exchange money for reproductive materials from poorer suppliers, who risk physical and emotional harm (and may be paid at a rate marginally above cost,

particularly if they do not possess highly demanded characteristics), while some poorer demanders are unable to obtain materials, is questionable at best.

Faced with such difficulties, some might argue that an unconstrained market on the supply side and state allocation or subsidization on the demand side is a possible alternative. But a supply-side market would still generate differential pricing, and paying market prices to suppliers could place a serious strain on health care budgets, such that the financial feasibility of state involvement in this area would be called into question. Thus, if some suppliers were well paid, it would not only be at the risk of inducing them to overcome their moral convictions, but would also be to the detriment of poorer demanders, who may lose state support in this area if involvement becomes too expensive. Importantly, if state involvement were to continue in this type of market, it would be to the detriment of those individuals who would be deprived of other (perhaps life-saving) medical resources due to the diversion of health care resources to applications of the new reproductive technologies.

It is clear that monetary inducements will always disproportionately affect the poor: even small sums may induce the indigent to participate as suppliers, and it would be next to impossible to offer enough money on a consistent basis to systematically induce the wealthy. It is also apparent that the tax and transfer system (the mode of income redistribution favoured by Rawls) will be unable to remedy vast wealth differentials among potential demanders, or remedy the relative poverty of many potential suppliers, so as to make access to a relatively unconstrained market distributively just (at least in the foreseeable future). Insofar as we are particularly concerned about distributive consequences when the material in question has strong personal and moral implications, it follows that unconstrained commodification of reproductive material is unacceptable. However, banning the use of supplied reproductive materials and services and fetal material also seems a drastic measure. We would prefer to permit the exchange of these materials and services, while attempting to anticipate and constrain many of the possible negative effects. Accordingly, we are in favour of what we have called "constrained commodification." As noted above, this orientation toward enablement, not inducement, is informed by our first principle (the Principle of Uniqueness); its implications are explored in the two remaining principles (the Principle of Constrained Choice and the Principle of Fair Access).

Finally, we invite the reader to look to each individual regulatory scheme outlined in Part 6 to understand how we would apply the concept of constrained commodification. While the application of this concept is modified slightly to meet the particular issues relating to each type of material and service, we have attempted to maintain a high degree of consistency.

### (b) Enabling Altruism

If the supply of materials and services is to be increased, measures that do not involve substantial monetary inducements (which may induce disadvantaged persons to bear a disproportionate share of the physical and psychological risks entailed) must be considered. Appeals to altruism, unlike financial incentives, would draw a relatively equal response from all socioeconomic groups in society. However, while the wealthy can afford to be altruistic (that is, they can afford transportation costs, foregone wages, babysitting expenses, etc.), the less well off (who are also motivated by altruism) can ill afford these basic expenses. Therefore, it would seem appropriate to offer compensatory payments - reimbursement for travel costs, out-of-pocket expenses, and some basic time costs — to enable all persons who wish to participate to do so. It is essential that these payments be "enabling" only, i.e., they must be compensatory without having an inducement effect. Compensation for a supplier's time is problematic since, generally speaking, payments equal to an individual's opportunity costs (the money that the individual would otherwise earn) may make the individual indifferent between participating in the activity and continuing in her or his normal employment; and payments in excess of opportunity costs function as an inducement to participate in the activity. We would suggest that compensation for a supplier's time be set slightly below the minimum wage, 497 with special provisions for those on social assistance and those not employed in the labour market. 498 This level of compensation would achieve our goal of facilitating altruism by offering compensation without causing inducement effects for the poor.

# (c) The Research Subject Analogy

Our position with regard to compensation rather than inducement receives support from the ethical recommendations of the Medical Research Council of Canada (MRC)<sup>499</sup> and the Office of Research Administration at the University of Toronto in their guidelines on the use of human subjects for research. 500 Research subjects are in a position similar to that of de novo gamete, pre-embryo, and fetal tissue suppliers and of women providing gestational services - they are incurring risks and expenses to participate in a medical procedure that is not of direct therapeutic benefit to themselves. Since subjects do experience some discomfort and inconvenience, and reap no direct medical benefits from the procedures, it would seem unjust not to offer compensation; however, the MRC and the Office of Research Administration are concerned that when money is introduced, less well off persons will be disproportionately attracted as subjects. 501 The solution reached is to offer compensation for out-of-pocket expenses and to pay for time at a rate no higher than the minimum wage — in effect, to enable altruism by offering reimbursement for certain legitimate expenses but not to offer inducements. 502 Both the concerns and the solution are clearly very similar to our second principle.

#### (d) Justifiable "Discrimination"

### (i) Supply Side

Altruistic suppliers of materials or services may be more likely than paid suppliers to be truthful about the presence of genetically linked diseases in their family histories, and about their current state of health, 503 but even an honest supplier may not be aware that she or he has a sexually transmitted disease. We would therefore require all prospective suppliers to undergo blood tests and other necessary medical tests. Psychological screening, designed to discover whether the prospective supplier is able to understand the implications of supplying materials or services and is consenting to the procedure, may also be important. (Those incapable of consenting, e.g., mentally retarded or mentally ill persons, would not be permitted to participate.)

In the context of reproductive materials and services, it would also seem reasonable to take account of concerns that the number of children genetically related to one individual supplier not become large enough that the children could unknowingly meet and have children of their own together. This concern could be met by establishing a limit on the number of children that one supplier could parent (including the children that the supplier has produced for herself or himself). 504

Some studies have suggested that a central record-keeping agency<sup>505</sup> be established to record information regarding the number of children that a given supplier has parented, and to inform recipients if genetically linked diseases develop in the supplier after the child has been born.<sup>506</sup> The supplier would also be informed if the child developed genetically linked diseases. This information could be relayed through a central agency, without revealing names or other identifying information. A central agency could also be used for the initial matching of prospective suppliers and demanders, and for the facilitation of continuing contact between the parties where this is desired. We discuss this possibility in more detail below.

#### (ii) Demand Side

We would require prospective recipients of reproductive materials and services, like prospective suppliers, to meet certain minimum medical and psychological criteria. Some would argue that the state ought not to set any requirements for demanders since the state does not purport to restrict anyone from having children naturally. Others might argue that use of supplied materials is more similar to adoption than to natural reproduction, and that standards are routinely set to screen adoptive parents. Regardless of whether natural parenting or adoption is the better analogy, it is clear that the state does set minimum standards for all parents once the child is born: the state may assume custody of the child if its parents are subjecting it to abuse or neglect. It would not seem unreasonable to require prospective recipients to meet minimum conditions necessary for

the safety of the child. For example, recipients who would pose a threat to the child's safety include untreated hard drug addicts, sex offenders, etc.

One could also imagine purely medical restrictions on access to reproductive materials and technologies, and the therapeutic use of fetal material: persons with a very low probability of conceiving or sustaining the pregnancy, or benefitting from the transplant, might not be permitted to participate. This would be similar to the current practice of allocating expensive medical resources (such as organs for transplant, and use of dialysis machines) only to those who have some probability of significantly benefitting from them.

While some grounds for restricting access to reproductive materials and services are legitimate, others are unjustifiably "discriminatory" in that they do not have a bearing on the demander's ability to parent a child. We would suggest that race or ethnic background, socioeconomic status, sexual orientation, and marital status of demanders ought to be included among the grounds for discrimination considered unjustifiable. That is to say, we would not, from the start, exclude demanders from participation in exchanges on the basis of these characteristics; the question of whether suppliers and demanders should be permitted to "discriminate" by specifying which characteristics they would require in an exchange partner will be discussed below.

#### (iii) Spousal Consent for Reproductive Materials and Services

Another issue is whether the consent of spouses or partners ought to be obtained before suppliers or recipients are permitted to participate in the exchange of reproductive material or services. We are reluctant to require the spouse's or partner's consent, since this would significantly impair the autonomy of the supplier or recipient. On the supply side, in situations where the materials or services in question involve the body of only one partner (and where the material, or child, produced will be transferred to the demander such that the supplier's partner incurs no support obligations), we would not require spousal consent. Thus, gamete suppliers and gestational service providers would not be required to obtain their spouse's consent. It would seem reasonable to require the consent of both partners in the case of pre-embryo supply, because both partners have contributed to the creation of the material.

The situation with regard to the demand side is more complex, because a child who will require financial support and emotional nurturance will potentially be produced. It would seem unjust to require the recipient's spouse or partner to provide support for the resulting child if he<sup>507</sup> was not aware of, and accordingly did not participate in or otherwise consent to, the use of supplied materials and services. The Reid Report, produced by the combined ethics committees of two Canadian medical societies, concluded that recipients should be permitted to obtain materials without their spouse's knowledge or consent, but the non-consenting spouse should be relieved of support obligations to the resulting child. <sup>508</sup>

This proposal seems reasonable in principle, but how it would be implemented in practice is problematic. The Report recommends that the doctor inform the recipient's spouse at the time that a request for materials is made, "so that paternity assumptions not be invoked through deception." 509 An obligation such as this seems both to violate the duty of confidentiality owed to the patient and to require a significant intrusion into the patient's privacy. However, it is possible that if the clinic does not inform the recipient's spouse that the recipient is receiving donor materials, the recipient could allow her spouse to assume that the child is genetically related to him. He would then register his own name on the birth certificate and become responsible to support the child, which is likely to result in a significant degree of emotional involvement and a large expense over a period of many years. Ideally, in a society where relational understandings of parenthood predominated and genetic ties were considered less important, a possible subsequent discovery that the child was not genetically related to him would not cause significant disturbance to his relationship with the child (although the element of what could be perceived as deception might trouble his relationship with his spouse). But realistically, in our own society, some persons who subsequently discover that their child is not genetically related to themselves might become distraught, and the child herself might bear the brunt of her social parent's emotional reaction — which would clearly be an unjust and highly undesirable eventuality.

One solution might be to advise the prospective recipient at the time of her first inquiry that if she should decide to make use of donor materials her spouse will be informed<sup>510</sup> and that he is entitled to refuse to support the child. This may act as an incentive to the prospective recipient to discuss the matter with her spouse or to consider whether she can afford to support the child on her own. This would seem to be a reasonable compromise solution: it permits the recipient to use donor materials even if her spouse refuses consent, and it also permits the spouse to decide whether or not to participate in raising and supporting the prospective child.

However, the question of an appropriate time period to permit the unconsenting spouse to make his decision about whether to parent (and support) the resulting child must be addressed. It would seem extremely harsh from the point of view of the resulting child (and also of the couple and family unit) to permit the unconsenting spouse to establish a relationship with the child, and indeed participate in raising it, without incurring any obligation to support that child — merely because he did not consent to its original conception or gestation. It would seem appropriate to establish that relief from support obligations would be available only if the parties separated or divorced prior to the child's birth. Moreover, current family law provisions may well hold a partner who is in a parental relationship with a child (whether the child is genetically or gestationally

related to that person, and whether that person consented to the child's conception and gestation or not) responsible for supporting the child.<sup>512</sup>

# (C) The Principle of Constrained Choice

#### (a) Information and Licensing

The third principle we propose is that a significant range of choices be available to both suppliers and demanders: suppliers and demanders must be given as much discretion as possible to determine their own arrangements. To make these choices, suppliers and demanders must be provided with all relevant information about risks, costs, benefits, alternatives, etc. We recognize that informational "counselling" may be most effective when it is administered by individuals who are sensitive to the particular situation and concerns of the persons they are serving. We would therefore recommend that the state establish minimum standards and guidelines (establishing, for example, what information must be provided and what screening criteria are to be applied) and grant licences for individually and group-operated clinics. In the context of reproductive materials and services, one could imagine certain groups (for example, religious or cultural groups, disabled persons, gay and lesbian organizations, feminist groups, and persons from minority ethnic groups) meeting licensing standards and administering their own clinics. 513 This system would ensure that consistent standards are maintained, but that suppliers and demanders from different backgrounds can ask questions, share experiences, and participate in an environment that is comfortable for them.

# (b) Entitlements and Contracting

Another important role for the state is in the establishment of background entitlements and the designation of which entitlements can be waived or contracted around. We are in favour of background entitlements because they ensure a degree of certainty and predictability, but we would permit contracting around certain entitlements so as to provide individuals with as many choices as possible. One entitlement would be a presumption of anonymity: suppliers and demanders would be entitled to participate in exchanges without contact with each other. This would protect the interest of both parties in maintaining privacy and avoiding unwanted interference. However, suppliers and demanders would be free to contract around this entitlement and decide to meet and become acquainted, if they so chose, before participating in the exchange of gestational services, gametes or preembryos, or even fetal material.

When allowing for the possibility of contracting around background entitlements, it is important to distinguish between agreements that are reached *ex ante* and those that are reached *ex post* (that is, agreements made before, rather than after, the materials are used or the service commenced). It is important to strike a balance between allowing parties as much freedom as possible to make (and change) arrangements to fit their particular needs, and recognizing the need for parties to know what

to expect of each other and be able to predict the consequences of their choices. For instance, it would seem reasonable to allow all parties to an exchange of sperm to mutually agree, ex ante, that the genetic father would receive pictures of the child, but would not visit, 514 and it would also seem reasonable to hold the genetic father to that agreement ex post, rather than permit him to attempt to renegotiate via the central agency, or attempt to contact the demanders directly. If parties were not held to their agreements ex post, one could imagine that the central agency might be overwhelmed with requests to renegotiate: suppliers and demanders might continue to contact the agency repeatedly over long periods of time, and the costs of administering a renegotiation process (in terms of both the financial, bureaucratic costs and the emotional costs to the parties) could be substantial. While these restrictions on renegotiation may seem strict, it is important to recognize they apply only to situations in which the parties have chosen, ex ante, not to exchange full names and addresses for the purpose of ex post renegotiations. In other words, parties are still free to agree ex ante to leave open the possibility of ex post renegotiations, and to conduct these negotiations among themselves rather than through the central agency.

Yet, while we believe ex ante agreements ought to be consistently enforced ex post, we would add one significant qualification: we would include in every ex ante agreement a non-waivable background entitlement allowing suppliers a period in which they could choose to "opt out" of the agreement. 515 We would not allow parties to contract around this entitlement because we believe the entitlement is an important way of safeguarding the voluntariness of the agreement and recognizing the possibility of subsequent regret. The opt-out period would need to be sufficient to allow the supplier time for second thoughts (e.g., time for the supplier to rest and take steps to recover herself emotionally after the birth, abortion, or gamete-procuring procedure). However, the period should not be so long that the usefulness of the material is compromised, or undue hardship caused to the demander (who must endure correlative uncertainty). The number of days or weeks chosen for each type of exchange should reflect a balance between respect for a legitimate process of reconsideration or change of circumstance, and the need of all involved for resolution and certainty. With regard to the exchange of gestational services, it is relevant to note that, in the context of adoptions in Ontario, that period is four weeks.<sup>516</sup> We would not permit an opt-out period for demanders, because the opt-out is premised upon the concept of reconsidering the exchange in light of physical and psychological experiences occurring during the course of procuring or creating the material; demanders do not share these experiences, and it seems unreasonable for the supplier to undergo risks involved in producing the material (or, in the gestational services context, the baby) only to have the demander opt out arbitrarily (perhaps, in the gestational services context, because the baby is not exactly as expected). But while demanders would not be permitted to opt out, we would permit

them to return unused reproductive materials, or, in the gestational services context, place the baby up for (subsequent) adoption. The latter is a right that other parents already have, should unforeseen circumstances such as marital breakup affect their ability or desire to rear the resulting child.

Should suppliers decide to opt out of the agreement, we would, by analogy to rules applying to research subjects, allow them to keep payments earned up to the point of opt-out. 517 Withholding compensatory payments from suppliers makes it difficult for them to terminate their participation because they have invested time, effort, and out-of-pocket expenses in the exchange, in which they have been participating on an altruistic basis (i.e., they were participating with the intent of providing materials or services for the benefit of demanders). But if suppliers decide to opt out after the material (or, in the gestational services context, the baby) has been produced and retain the material (or baby) for their own use, they should be required to reimburse the state for the expenses of producing the material (or baby), because suppliers in these circumstances have become demanders (using materials for the production of their own children) rather than suppliers (providing materials or services for others). This provision would guard against opportunism on the part of persons who might otherwise have an incentive to purport to be suppliers, then deliberately opt out in order to produce materials (or babies) for themselves at the state's (and the demanders') expense.

# (c) Informational Entitlement for Resulting Children

We would also permit children who have been involved in exchanges of materials or services — whether born from supplied materials or gestational services, or perhaps as recipients of fetal material — to access their medical and administrative records at the central agency, once they have reached the age of majority. We would not, however, permit the child to have access to the supplier's name or other identifying information without the supplier's consent. It would, nevertheless, seem advisable for provisions governing children produced as a result of the new reproductive technologies to be harmonized, in this regard, with provisions governing children adopted following natural pregnancies. <sup>519</sup>

# (d) Specification of Characteristics

A key issue (particularly for autonomy theorists and some feminists) is the question of what characteristics suppliers and demanders can specify about each other. Autonomy theorists might agree with us that it would be inappropriate to exclude persons from participating in the market on the basis of racial or ethnic background, socioeconomic status, sexual orientation, or marital status, but might add nevertheless that suppliers and demanders ought to be able to specify their preferences in this regard and be matched accordingly. We agree that suppliers may well be concerned about the person or persons who will parent their genetically related child, and demanders may be interested in the characteristics of the person or

persons who will contribute the genetic material for the child they will raise. But to permit suppliers and demanders to specify race, sexual orientation, marital status, or attributes (e.g., height, eye colour, musical ability, IQ), or demanders to specify whether they want a male or female child, raises concerns about the reinforcement of negative stereotypes and discriminatory attitudes and promotes prospects for genetic engineering (i.e., selecting or manipulating genetic material in order to promote or produce certain characteristics). There is also the concern of feminists, discussed in Part 4, that demanders might expect a "made-to-order" baby, and would be disappointed if their baby did not display the qualities they "ordered."

Placing emphasis on various characteristics poses many other problems. For example, it can detract from a holistic view of personality and human potential; also, attributes such as musical or athletic ability are difficult to define, and suppliers and demanders could have different understandings of what these terms imply. It must also be recognized that it has not been established that attributes such as sexual orientation or musical ability are genetically identifiable or heritable; in any event, the child's characteristics will be the result of a myriad of environmental circumstances and the complex interaction of the genetic material of *both* parents. Finally, because the state administers the matching of suppliers and demanders, it may appear to be sanctioning or granting a measure of legitimacy to differentiation or discrimination on the basis of such characteristics.

Objections can also be raised from autonomy and utilitarian perspectives. From an autonomy perspective, the imposition of demanders' preferences (for example, intellectual or physical attributes) may compromise the autonomy of the resulting child: the demanders' decision to "select" for or against certain characteristics could constrain the child's autonomy by restricting the range of choices available to him or her in pursuing his or her own conception of "the good life." From a utilitarian perspective (and assuming that genetic manipulation or selection is not confined to a small number of individuals), the prospect of permitting demanders to impose their genetic preferences on the next generation of children raises the issue of how to determine which characteristics are most likely to maximize aggregate social utility. And how could any advance determination be made about how many persons with various attributes (e.g., mechanical or technical ability, athletic ability, musical ability) would be needed for the future? The difficulties entailed in performing a utilitarian analysis in this context, and the concerns raised from an autonomy perspective, indicate that permitting demanders to specify genetic contributions is a complex and problematic proposition.

In addressing these concerns, we would recommend denying suppliers and demanders the opportunity to specify characteristics. However, we would make an exception with regard to race. Our reasons for this exception are twofold. First, the Canadian Constitution recognizes that Canada is a multicultural society where the uniqueness of ethno-cultural

heritage is to be respected and affirmed.<sup>521</sup> It would seem to be in keeping with this respect for the continuity of culture and tradition to allow suppliers and demanders to specify race (e.g., one could imagine a Native supplier requesting that the material be provided only to a Native demander or a Native demander requesting a Native supplier). Second, accustomed as we are in our current social climate to natural conception, it is generally expected that a child who is born to a couple will resemble its parents with regard to racial characteristics. If demanders were not permitted to specify the supplier's race, one could imagine a situation in which (for example) a Black couple who has told no one about their use of supplied materials gives birth to an Asian child. The social reaction in such a case could cause the parents and the child a significant amount of embarrassment and distress.

While the aforementioned constraints on supplier and recipient designation may seem stringent to some, we re-emphasize that such constraints pertain only to the information that may be formally recorded. Parties who strongly desire to know more about each other have the option of mutually declining anonymity and choosing to meet prior to supplying or receiving materials. The availability of this option, coupled with the parties' freedom to decline to participate in the exchange after meeting each other, effectively enables interested parties to "screen" each other according to a variety of unique subjective factors. We acknowledge that this option has the potential to reintroduce discrimination "by the back door"; however, it could also potentially enable the parties to establish a rapport that might provide the foundation for a relationship between the various "parents" — which could be beneficial for the resulting child. Moreover, suppliers and demanders would be free to retain the presumption of anonymity and decline the opportunity to meet.

# (e) Fetal Tissue and Specification

We would permit suppliers of fetal material, like suppliers of other materials, to designate whether the material is to be used for research or therapeutic purposes. While it is likely that most suppliers and demanders of fetal material would be less concerned with the specification of characteristics and attributes than would parties to agreements involving the production of children, one could imagine particular requests in rare situations (for example, a pro-life demander requesting tissue produced from a spontaneous abortion [miscarriage], or a request by the supplier to be informed of the demander's medical condition following the transplant). While the majority of exchanges are likely to be anonymous, some parties might want to arrange to meet each other. We would retain a presumption of anonymity, but would permit arrangements such as the ones mentioned above.

### (f) Exchanges Within the Family

It is also important to address the question of suppliers designating recipients with whom they are already in contact, whether as friends, acquaintances or colleagues, or family members. There is a concern that demanders might use their relationship with potential suppliers to pressure the latter into providing reproductive materials. In the fetal tissue context, where a friend's or family member's life may be at stake, potential suppliers could face considerable pressure to conceive in order to abort the fetus and provide the material to the demander. 523 Concerns about such pressures are well known in the context of organ and bone marrow donation but, in those circumstances, potential suppliers may well have the protection of a medical practitioner who, at the supplier's request, could inform the family that the potential supplier was not a good match. However, because no "match" is necessary for fetal transplants, potential suppliers of fetal material would not have this protection. Moreover, we are of the view that a fetus is not directly analogous to an organ, in that it is a potential human being, genetically distinct from its parents, and, as such, is worthy of a measure of respect. To conceive a fetus for the express purpose of aborting it seems much more morally problematic than to provide one's own organs or bone marrow.

However, to suggest that suppliers of fetal material not be permitted to designate the recipient of the material is a difficult position to maintain. We are concerned that women not become pregnant in order to abort the fetus for transplant purposes, but there is no way of knowing whether that was indeed the case: it is not possible to divine women's motivations for conception or abortion, and were it possible, it would seem to be an undesirable intrusion on a woman's right to make her own reproductive decisions. And while families and friends have the potential to exert considerable pressure on potential suppliers, they may also inspire considerable altruism. It would seem anomalous to suggest that suppliers be permitted to provide fetal material to strangers, but not to their own family members or friends. In the context of other reproductive materials, it would also seem odd to allow a woman to gestate a pre-embryo for a stranger, but not for her own sister, for example. While we are very much aware of the concern expressed by Raymond that "altruism" may be suspect<sup>524</sup> in a society where there are many pressures on women to subordinate their own desires to the needs of others, be it family, friends, or children, we must also respect women's right to have abortions, or to participate in the supply of reproductive materials or gestational services, for their own reasons. The task of deciding on an appropriate response to this tension has been one of the most difficult aspects of this study, as we have found both feminist and autonomy concerns — and concerns about respect for the fetus, as explained above — strongly compelling.

Permitting recipient designation, while establishing certain safeguards (to be discussed in more detail in Part 6, below) to increase the likelihood that suppliers' choices are as informed, voluntary, and reflective of

suppliers' true preferences as is possible in our current society, would seem to us a reasonable compromise position. While a thorough exploration of the meaning of "informed consent" is not our mandate, we would suggest that, at a minimum, suppliers and demanders be provided with information about the potential *psychological* consequences of the exchange. We would also make non-directive counselling, designed to facilitate discussion and thorough exploration of the consequences and implications of participation in the exchange, mandatory rather than optional. The non-waivable right to an "opt-out" period as discussed above is yet another safeguard. We recognize that this solution will not completely satisfy all of the concerns raised by feminist, autonomy, and conservative communitarian theorists, but we suggest it as one option for the resolution of an extremely difficult dilemma.

### (g) Computer Matching

The process of pairing suppliers with demanders — by characteristics of race, if requested, and by preferences for anonymity or ex ante or continuing contact — could be accomplished by establishing a computer matching system. Such a system could be administered by the central agency discussed above. Individual clinics could counsel and assist potential suppliers and demanders in providing information, and the data could be entered in a central computer system. It is likely that a clinic serving a particular group in the population (for example, persons who are Greek Orthodox, who live in Toronto, and who, we might conjecture, sometimes want to maintain continuing contact) would serve many people who are eventually matched. However, in some cases, particularly when the supplier and demander want to remain anonymous, a match could be obtained from a distant location and the materials could be transported. If queues develop, individuals could decide whether to wait, to explore other options, or to change their declared preferences. It would not seem reasonable to allow some persons to "jump the queue," but suppliers and demanders who do not want to wait could modify their applications to accept a type of agreement or exchange that is in lesser demand.

# (D) The Principle of Fair Access

On the demand side, some state subsidization of the use of reproductive technologies, supplied materials, storage facilities, and drugs is essential to ensure access by demanders of all socioeconomic groups. We suggest that demanders be asked to pay for their use of the technologies per se, materials, drugs (which should be included since these are a major expense), and storage facilities, and the costs of pregnancy in the gestational services context, on a sliding scale: the state would heavily subsidize use of materials, technologies, etc., by poorer persons, and well-off persons would be required to pay the full cost. (The use of fetal material would be an exception to the sliding scale: we would require the state to pay the full cost of fetal tissue procurement and transplant procedures, since fetal tissue transplants may be medically necessary to preserve the demander's

Fertility-enhancing operations, such as repair of blocked fallopian tubes, are currently paid for by the state health care system, and an argument could be made that in some cases it is preferable, and autonomy-enhancing, to encourage potential demanders to address the cause of infertility rather than to expend resources on reproductive materials, services, and technologies. Certainly it would be less expensive, particularly for those who want large families, to correct the cause of the infertility rather than repeat procedures (e.g., IVF) each time another child is desired. With regard to the supply of fetal material, we would ensure that publicly funded abortions are available for *all* women: this would remove the concern that women who could not afford an abortion might be induced to supply fetal material for research or therapeutic purposes by the prospect of receiving a free abortion.

Expense is an important concern, even with partial contribution by better off individuals. It is important that the state determine what proportion of health care resources ought to be devoted to the technologies. Limits could be set on the number of times a demander could make use of the technologies, or on the number of children produced. Medical factors, such as a very low probability of success, could also be used to limit the number of demanders. The state would also need to determine what proportion of medical research resources ought to be devoted to the technologies.

A key way to reduce the number of demanders and to ensure that those who are involved are aware of the implications of their participation is to provide them with information about medical and psychological risks, and the requirements and responsibilities of parenting. From an autonomy perspective, it is preferable to provide individuals with information to facilitate their own preferences rather than impose external constraints. An important part of the information provided to demanders would be information about alternatives to having one's "own" (genetically related) child: adoption; foster parenting; volunteering with schools, recreation centres, and children's agencies; spending time with children of friends and family members; helping with teen groups in the community; donating money to organizations that care for children's needs in Canada and internationally; and perhaps even spending time with other groups such as handicapped or elderly persons who are in need of care. While trying to decide whether

to use the technologies, or while waiting, prospective parents could explore what parenting involves and decide if they are certain that they want to participate.

# Part 6. Proposed Regulatory Regimes

In this Part, applying the four governing principles developed in Part 5, we propose the central elements of regulatory regimes to govern exchange relationships in the three basic scenarios of concern to us throughout this study: gametes and pre-embryos, gestational services, and fetal tissue.

# I Gametes and Pre-Embryos

This regulatory scheme will attempt to establish a compromise position between those who argue for an unconstrained market in gametes and preembryos and those who express concerns about the potentially harmful effects of such a market. It will not satisfy those whose views fall at the furthest ends of the ideological spectrum with regard to these exchanges, but it will offer a reasoned "middle position" designed to seek out maximum common ground.

On the supply side, in accordance with the Principle of Enablement (Not Inducement), donors would be paid a sum to reimburse them for their expenses, and time would be compensated at a rate below minimum wage e.g., \$4 per hour. Payment by the hour is, in this context, preferable to lump-sum payments because it is more adequately tailored to the actual amount of time contributed; also, a lump sum may have an incentive effect on suppliers who excessively discount the time commitment involved due to unfamiliarity with procedures entailed in uses of the technologies, medical testing, and administrative procedures. Only de novo suppliers should be paid for time and expenses involved in procuring the material, because the purpose of money payments is to enable altruistic donors to donate by compensating them for expenses they would not have incurred otherwise (suppliers of spares would have incurred these costs in any event). Nevertheless, both suppliers of spares and de novo suppliers would be reimbursed for costs directly associated with the administrative organization of the donation (e.g., screening procedures). Payment by demanders would be on a sliding scale.

Suppliers and demanders would both need to be provided with full information about the relevant physical and psychological risks entailed in the activities. Both would be screened according to medical and psychological standards. With regard to ova donation (and also the provision of gestational services), instead of paying women to accept *ex ante* risks such as developing ovarian cancer, infection, or maternal diabetes, the state would be held strictly liable for harm caused by the drugs or procedures

involved (the state would be liable on proof of causation rather than negligence). This would ensure that of all the ova donors or suppliers of gestational services who incur the risk of subsequent harm, only those for whom the risk materializes would be compensated for it; however, these individuals would be compensated fully.

Suppliers and demanders would be matched through a central computer system in keeping with their preferences for anonymity or meeting *ex ante* or *ex post*, among other factors. Also, again in keeping with our desire to avoid inducement effects, and the concomitant risk of differentiation or discrimination on the basis of racial characteristics, we would forbid differential pricing: public appeals for donors from certain specific groups might be permissible if supply shortages were acute, but all donors who volunteer and meet the standard criteria should be accepted, and compensated for their expenses at the same rate, as outlined above.

The autonomy of suppliers would be respected by the establishment of an "opt-out" period during which they could change their minds about providing the materials, or about the disposition of the materials. Up until the point when the materials are used, suppliers could require a change in the disposition of the materials (i.e., they could require that the materials be used for research rather than procreation, or that the materials be destroyed). This opt-out period is of even greater importance in the gestational services context.

Focussing on the demand side, we would allow a recipient to obtain materials without her spouse's consent. However, in accordance with the concerns expressed in Part 5 above, the potential recipient would be informed that in the event that she decided to make use of the materials, her spouse would be informed, and would have the option of being relieved of support obligations for the resulting child. He would, however, need to exercise this option prior to the time of the child's birth, in the interests of protecting the child (and the couple and family unit) from the establishment of some sort of parental relationship devoid of support responsibilities.

Storage issues must also be addressed. We propose that individuals and couples sign a form setting out their wishes should any of a set of eventualities occur, e.g., divorce, death, etc. It would seem appropriate to establish a set of background rules on these subjects (e.g., on the death of one spouse, the materials may be used by the other spouse) and individuals and couples could contract around these rules. We also recommend there be limits on the number of gametes and pre-embryos that any individual can store: this is designed to guard against concerns about the costs and other social implications of overuse of the technologies.

In addition, such possibilities as "stockpiling" genetic material, bequeathing gametes and pre-embryos in wills, and bringing into the world children whose genetic parents died many years previously lead us to suggest a time limit on storage of materials (perhaps 20 years). After that time the materials would be disposed of according to the wishes expressed in the initial form. The three available alternatives would be: donation to

another individual for immediate use, destruction, or donation for research purposes. Imposing a 20-year limitation period would also likely bring about an increase in the supply of spares, since some persons would presumably choose to donate, rather than destroy, their materials at the end of the 20-year period. However, any materials that are donated would still have to be used in keeping with the rule limiting the number of children that can be genetically parented by one person.

With respect to materials not subject to long-term storage issues, since the state would have governance over the receipt, storage, allocation, and distribution of materials for reproductive purposes, it would seem reasonable to also entrust the state with the allocation of gametes and preembryos for research purposes. It would be important to establish a mode of allocation to ensure that the demands of individuals and those of research interests are both met. It is unlikely that research interests would have difficulty acquiring a sufficient supply of materials, since some donors are likely to prefer that their genetic material be used for research rather than creating children for others. Also, ordinarily research interests do not require gametes or pre-embryos from donors of a particular race, for example; and some researchers can also make use of donated materials that are damaged, chromosomally abnormal, etc. In summary, we anticipate that this scheme will meet many of the concerns of theorists within the major normative perspectives by permitting those who wish to participate in the exchange of materials to do so, while constraining some of the more disturbing potential supply- and demand-side consequences of unconstrained commodification.

#### **II Gestational Services**

The following is a legal framework that, on the one hand, appears to preserve some of the potential benefits of gestational service agreements and, on the other hand, attempts to meet a number of the concerns identified relating to these agreements. We propose this legal framework in accordance with the four guiding principles. As was the case with gamete and pre-embryo exchanges, we recommend that the provision of a woman's gestational service be allowed only in an environment heavily constrained and regulated by the state. We do not believe that women ought to be financially induced into participating in these arrangements, nor do we believe that women who desire to offer their services altruistically ought to be prohibited from doing so. We recognize that our proposed compromise will not satisfy those who advocate banning gestational service agreements outright, nor those who believe that all gestational service agreements outright, nor those who believe that all gestational service agreements outlight to be specifically enforced. Our objective has been to find some middle ground between these two extremes.

It is clear to us that in this context certain background legal entitlements must be firmly secured. This is particularly important on the supply side, where concerns are widely held about the potential for women's exploitation as gestational service suppliers. In accordance with many of these concerns, we advocate two important safeguards for these women: (1) the birth mother ought to be legally presumed to be the child's mother;<sup>525</sup> and (2) the birth mother must have an absolute right to "opt out" of the gestational service arrangement after the child's birth if she so desires within a given time period, in which case she would retain full custody of the child.<sup>526</sup> The birth mother's right to be presumed the child's mother would terminate at the end of the opt-out period, if the woman does not choose to opt out of the agreement. Each of these entitlements will be discussed in turn.

First, we would note that both entitlements respect many of the concerns identified in the various normative frameworks. Distributive justice concerns, for example, identify the risk that disadvantaged women who act as gestational carriers of others' genetic material could be exploited. Ensuring that these women are legally held to be the mothers of the children they gestate will provide them with a minimum safeguard against such exploitation by ensuring that they have all of the rights and obligations that natural maternity entails, regardless of their lack of genetic contribution to the child. Women are less likely to be objectified and treated as mere "breeders" if they have control (at least initially) over the disposition of the child to whom they give birth. And with this protection, some conception of a unified "motherhood" will be retained, in line with some feminist concerns.

Another concern is that birth mothers may tend to underestimate the bonding process that takes place with the child while it is in their womb. This process may render them unprepared to transfer the child to others after its birth. Allowing these women the right to "opt out" of the agreement once the baby is born means that they will be able to re-assess their judgment of the arrangement's implications for them in light of their evolving feelings and information. Efficiency theorists might argue that the uncertainties entailed in a legal system permitting "opt-outs" are a disincentive for its effective operation. We reply by noting that the "opt-out" right does strengthen incentives for more careful screening of suppliers to ensure that the latter are informed about the nature of the agreement and are emotionally stable and psychologically prepared to undertake the commitment of providing gestational services.

Martha Field, among others, has proposed an approach to this issue that seems appealing. Field would establish a presumption that the birth mother be entitled to keep the child, on the basis that as of the date of birth the mother and baby will be bonded much more closely than father and baby. By analogy with adoption rules, Field would also provide a short period after birth for the birth mother to repudiate the gestational service agreement (subject to an unfitness caveat as defined in current child welfare laws, which applies to all parents). Current Canadian adoption law prohibits a birth mother from giving consent to an adoption until seven days after the baby's birth; and three weeks are then provided

within which the birth mother can change her mind.<sup>532</sup> We suggest that this four-week period is an appropriate one to apply in the context of gestational service agreements. Establishing these presumptions would not only respect the autonomy of the birth mother to make her own decision in light of changing emotions and information, but would also avoid the uncertainty and psychological trauma for all parties to the agreement of custody litigation and, particularly, of the damaging publicity and uncertainty that may impair the future well-being of the child — a real "cost" of gestational service agreements that ought to be avoided in the interests of the children involved.<sup>533</sup>

Once the child is born, however, and the opt-out period has elapsed, we recommend that the gestational service agreement be fully enforceable, i.e., that the transfer of custody be enforced and maintained. By this point, the birth mother will have decided she is prepared to give up the child, and the child's life with its new parents must be free to begin. The contact that might then ensue between the child and its birth mother would be up to the birth mother and the commissioning individuals together to determine; this determination would have to take place at the time of the original agreement, and would be subject to modification at a later date, if both parties had agreed *ex ante* to leave this option open by, for example, exchanging identifying information.

As was the case with gamete and pre-embryo exchanges, we propose that a central registry of potential participants be established; perhaps the same registry could be used in conjunction with all reproductive technologies. Potential suppliers and demanders<sup>534</sup> would participate in the screening procedures outlined above, <sup>535</sup> and be provided with comprehensive information about the gestational service scheme. This would include information about all costs and risks associated with the process, particularly those associated with a purely gestational service arrangement such as Embryo Gestation and Transfer, in contrast to a Pre-Conception Agreement, and the gestational mother's right to opt out of the scheme. Once both demanders and suppliers had made their desires known to a licensed agency, the central registry of interested parties could be used to "match" suppliers with corresponding demanders, in accordance with their declared preferences.

A number of substantive questions must now be addressed. First, ought a gestating mother be free to undergo an abortion during her pregnancy without the consent of the commissioning individuals? Since natural mothers in other relationships have such a right independent of their partners, <sup>536</sup> we are convinced that the position should be no different in the case of women choosing to gestate for others. <sup>537</sup> This conclusion is entirely consistent with the autonomy of birth mothers, and also with many feminist concerns that pregnancy is a particularly woman-centred process, and that the fetus should not consequently be seen as the "property" of the commissioning individuals. Commissioning individuals would also have to accept the risk of a gestational mother miscarrying the fetus. Since the

birth mother would not be profiting financially from the termination of the pregnancy, there would be no cause for commissioning individuals to complain of opportunism on her part.

The autonomy principle in this context would also seem to dictate that a birth mother should be allowed to control decisions made about her body and the fetus during her pregnancy; that is to say, she should not be forced against her will to undergo any medical tests or treatments. 538 difficult issue is the extent to which her drug-taking, drinking, smoking, or eating habits might be controlled during the pregnancy. Certain commissioning individuals will undoubtedly seek to impose restrictions on these forms of behaviour by the gestational mother during the pregnancy. While we would recommend that women abide by some of these restrictions, and encourage them to do so, we believe strongly that a pregnant woman should never be forced to conduct her lifestyle in a certain way. To attempt to legally compel a pregnant woman to refrain from drinking alcohol or smoking cigarettes during her pregnancy, for example, would not only run contrary to the courts' traditional refusal to compel specific performance in personal service contracts, but would also conjure up visions of extreme scenarios in which the commissioning individuals hire detectives to spy on the gestational mother, attempt to confiscate alcohol and cigarettes in her possession, etc. We would hold any promises with regard to refraining from smoking or drinking to be legally unenforceable, and a breach thereof as providing no grounds for repudiation of the agreement.

If the commissioning individuals should change their minds about the arrangement during pregnancy or before transfer of the child, for example because the wife of an adoptive couple has become unexpectedly pregnant, or the adoptive parents have separated, or the child is born disabled or is in some other way unacceptable to the commissioning individuals, they will not be free to renounce the child. It would be extremely harsh to leave the child "parentless"; the commissioning individuals, like natural parents, must accept the risks of conceiving or helping conceive a child in circumstances different from those previously intended or desired. Like any other parents, they would then have the option of putting that child up for (subsequent) adoption if they felt unable to care for it adequately.

Another significant issue is that of payment to suppliers. It is over this question that the most emotional and divisive debates have taken place on the subject of gestational service arrangements. As we have described above, our proposed regime of "constrained" commodification would prohibit women from being induced into providing their gestational services for financial reward. Any calculation of a compensation payment will be controversial. In the case of gestational service sale, the women most vulnerable to financial inducement are likely to be those of middle or lower income who are at home looking after their children, because these women are the ones most likely to have the time and flexibility to provide gestational services at low opportunity costs. In order to be faithful to our guiding principles, it is crucial that our payment scheme not *induce* these

women into becoming gestational service providers. Beyond compensation for basic out-of-pocket costs (e.g., medical and transportation expenses), we propose the payment of a modest "lump-sum" figure set at a level slightly below minimum wage opportunity costs, which might be approximately \$5 000 (adjusted annually for inflation). Payment is suggested as a lump sum, despite the concerns about lump-sum payments noted above, because per-hour estimates are extremely difficult to calculate in the gestational services context: though a woman is "working" 24 hours per day to gestate the child, she is also free during much of that time to perform other tasks. This is not the case in the gamete, pre-embryo, and fetal tissue donation contexts, where we suggest that suppliers be paid by the hour.

With respect to demand-side payment for gestational services, our fourth Principle (that of Fair Access) dictates that the cost of this service be paid for on a sliding scale.

We anticipate that under our system conditions will be similar to those obtaining currently, in that there will be more demanders for gestational services than suppliers. The anticipated disparity between the number of suppliers relative to demanders will undoubtedly lead to some queuing by demanders, and strict efforts must be made to ensure fair and equal access. To this end, we recommend that the number of times any one commissioning individual can engage the services of a gestational mother be limited to one birth. The use of the central registry would prevent commissioning individuals from having several women inseminated at the same time.

#### **III** Fetal Tissue

The regime that we propose will be antithetical to those who favour a complete ban on all forms of fetal tissue transplantation and procurement, either because of convictions regarding the moral abhorrence of abortions or because of concerns regarding the possible exploitation of the woman supplier. Similarly, our regime will not satisfy theorists (primarily autonomy and efficiency theorists) who advocate that an unlimited right to sell fetal tissue be vested in the woman supplier. Our use of the concept of constrained commodification is an attempt to compromise between these two extreme positions.

To discuss the specifics of the proposed regulatory regime, we will look at the supply and demand sides separately. On the supply side, the issue of payment is of greatest importance, since we are concerned not to offer women a financial inducement to abort, or to conceive fetuses for the purpose of aborting them, in order to provide tissue for transplant purposes. The different ways in which fetal tissue may be supplied require separate scrutiny.

Most fetal tissue will become available from elective abortions of pregnancies for non-tissue procurement reasons. A woman who chooses

to undergo an abortion of her unplanned pregnancy, and is subsequently asked whether she would like to donate the fetal tissue for research or therapeutic use, does not incur any additional costs beyond those already incurred as a result of her decision to abort (analogous to the situation with regard to "spare" pre-embryos, outlined earlier). Since any opportunity costs or expenses incurred as a result of the decision to abort are unrelated to the decision to donate fetal tissue, a woman in this position should not receive any reimbursement beyond reimbursement for time spent on administrative procedures with regard to the donation of the tissue (which would be minimal). Set 1

With respect to women who become pregnant and intend to carry the fetus to term, but instead decide to abort in order to donate fetal tissue, again the four principles indicate that this decision should not be affected by financial inducements. Nevertheless, in this situation, it is impossible to argue that any costs incurred as a result of the abortion are unconnected to the decision to donate and therefore should not be compensated, because the abortion would not have occurred but for the decision to donate. Thus, a *theoretical* application of the four principles would mandate reimbursement for any additional costs such as opportunity cost (which would be compensated at just below minimum wage, as proposed above) and expenses such as child care for the children of the supplier during the time of the abortion, for example. The costs of the actual abortion are borne by the relevant state health care plan.

A similar argument can be made in the context of women who decide to become pregnant in order to abort and donate fetal tissue. The principle of constrained commodification would *theoretically* require us to pay the supplier only enough to enable her to fulfil her desire to undertake an intentional pregnancy for tissue procurement purposes.

The paradox with which we are faced in designing a regulatory scheme that will accommodate these three different ways of procuring fetal tissue and the differing amounts of payment dictated by the principle of constrained commodification is as follows: the only way to distinguish among these three different methods of supply is to use the motive or intent of the supplier as a guide. That is, at the time of the abortion and tissue donation, when questions of appropriate payment arise, the sole distinction between a woman who wishes to terminate her unplanned pregnancy and a woman who intentionally became pregnant for the purpose of aborting and donating fetal tissue is the motivation (or lack thereof) behind the decision to conceive. Similarly, the sole distinction at the time of the abortion between a woman who wishes to terminate her unplanned pregnancy for reasons unrelated to tissue procurement and a woman whose abortion decision is motivated by the desire to donate fetal tissue is the motivation behind the abortion. The problems associated with such an approach are manifold. Enforcement of a motive-based scheme would raise serious evidentiary difficulties. In addition, a governmental scheme that requires an inquiry as to intent at the time of conception or abortion might constitute an unconstitutional invasion of the privacy of the woman involved. 542

Our response to these difficulties is mandated by the importance we attach to avoiding payments that would induce women to donate tissue, either through intentional conception or through abortion of a pregnancy they would not have terminated otherwise. If motive is an unworkable distinction, then in order to avoid payments that act as inducements, the amount of payment must be set at the lowest of the three procurement situations, namely, abortion of an unplanned pregnancy for reasons unrelated to tissue procurement. We noted above that payment in such a context would cover only the minimal time period required to resolve administrative matters preparatory to the donation, because no additional costs are incurred by the supplier as a result of the decision to donate.

In situations where the supplier herself offered to undergo an abortion using more dangerous techniques, or to prolong the pregnancy in order to procure the tissue or organs in a more mature or useable state, compensation would be paid to the supplier for any costs incurred as a result of the change in techniques or timing. For example, a woman who agreed to undergo an abortion procedure requiring time off work for recovery (as opposed to the usual suction curettage abortion) would be compensated at the rate already determined (below minimum wage) for that time. The reason for compensation here relates back to the research subject analogy discussed earlier. The costs and risks incurred due to the change in technique or timing are of no direct therapeutic benefit to the woman herself and, in the absence of a financial inducement, are offered out of an altruistic desire to provide more mature tissue or organs for demanders.

The timing of consent to donation is an important issue. Women should be asked whether they are willing to supply the fetal tissue after they have decided to abort, but prior to the abortion itself.<sup>543</sup> There are a number of reasons why consent must be obtained before the abortion occurs; these include: the need to transport and utilize the tissue soon after the abortion;<sup>544</sup> the possibility that post-abortion consent could be affected by anaesthesia used during the abortion;<sup>545</sup> and the possibility that the emotional effects of the abortion itself might influence consent given after the abortion.<sup>546</sup>

The provision of information regarding the possibility of donation, and the obtaining of consent, would take place after the decision to abort is made, unless the woman requests such information earlier. Adequate time to make both independent decisions (the decision to abort, and the decision to supply the fetal tissue) should be allowed. There should be separate consent forms for the abortion and fetal disposition, and it would be important to ensure that information regarding donation comes from different personnel than those providing the abortion information, so that the possibility of medical personnel experiencing a conflict of interest or exerting pressure on the woman to donate is minimized. The potential supplier would need to be provided with all relevant information about the

tissue "donation," and the need for information would be especially acute when suppliers are asked to undergo the more dangerous abortion techniques or to postpone the abortion in order to obtain more useable tissue. Suppliers would be screened in accordance with medical and psychological standards tailored to the fetal tissue donation context. And while the vast majority of fetal tissue exchanges are likely to be anonymous, matching may occur where, for instance, parties would like to meet *ex ante* or *ex post* or where the supplier would like to be advised of the demander's condition *ex post*.

Suppliers would be entitled to opt out of the donation of fetal tissue after consent has been given, up until such time as the tissue is actually used (or as long as the usefulness of the material is not compromised). However, such a right may become illusory if the time between donation and processing (at which point the identifiability of the tissue may be compromised) is medically required to be short. If medically feasible, we would be in favour of a regime that allowed for a period of a few days subsequent to donation during which the supplier would be able to opt out and ask that her tissue be destroyed or used for another purpose (e.g., a research rather than therapeutic application).

On the demand side, adequate information must be provided to potential recipients before the decision to undergo a fetal tissue transplant is made. Information regarding specific risks and the difficulty of quantifying the risks associated with such an experimental procedure must be made available. As noted previously, the source of the tissue, which is almost always elective abortions, must be disclosed to potential recipients, who may find abortion morally abhorrent. Additionally, all demanders would be screened in accordance with medical and psychological criteria to assess their physiological amenability to the transplant and their psychological perspective on the subject. Since fetal tissue is a potentially life-saving resource, it should be allocated on the basis of medical need and utility, and these decisions can be made only by qualified expert medical personnel.

With regard to payment on the demand side, since the transplantation of fetal tissue is therapeutic in nature, the cost of the transplant would be borne by the state health care system. Due to the cost of the accompanying technologies and the time and resources required to make use of them (e.g., doctors, nurses, medical personnel, equipment, etc.), careful decisions would need to be made with regard to the appropriate proportion of the health care budget to devote to this type of therapeutic intervention.

The procedural aspects of the donation and transplantation of fetal tissue would be regulated according to the following scheme. The collection of fetal tissue from abortion clinics and hospitals would be performed by retrieval agencies. At some point in the future, the presence of for-profit tissue processing companies in Canada may become a factor. These companies could be paid a fee to process and proliferate the fetal tissue obtained from the non-profit retrieval agencies. The tissue would then be

allocated to hospitals using a national allocation computer data base that would contain information regarding all potential recipients of fetal tissue and their medical needs. Tissue would also be allocated for research purposes.

# Part 7. Concluding Remarks

Given strongly held views as to which normative perspective represents the most appropriate framework for evaluating the new reproductive technologies and the possibilities for commodification of reproductive materials and services that these technologies entail, and given that many individuals are likely to feel simultaneously attracted to the values inherent in several of these perspectives and internally torn over the value conflicts they present, it seems appropriate, as a matter of policy, to proceed with considerable caution — in other words, to adopt a strategy of "minimax regret." This means that policies should be designed to foreclose the more catastrophic or socially destructive possibilities that can be envisaged. Accordingly, we have attempted to strike a balance between individual choices and (hopefully) avoidance of the more extreme and possibly negative consequences of unconstrained market activity, by leaving open the possibility of participation in exchange relationships with regard to use of the new reproductive technologies under a constrained set of circumstances. We believe that such a strategic orientation reflects a sensible recognition of the kind of risk aversion that influences most individuals in making their own life plans. Our choice of regulatory principles with regard to the appropriate role for commercialization of reproductive materials and services, and the applications of these principles in the three exchange scenarios, is heavily influenced by this general strategic orientation.

There seems to be little doubt that the new reproductive technologies, and some of the more extreme implications that they may entail, such as genetic engineering and selective insemination and implantation of genetic material, will pose some of the most morally anguishing and potentially socially divisive issues that we are likely to face as a community in the decades ahead. While we have attempted to identify some areas of commonality and compromise among the various normative perspectives, and have developed regulatory principles reflecting these commonalities and compromises that may channel and constrain a system of exchange in the present context, we have no illusions that in this paper we are able to offer any simple normative talisman that can guide us to the light on the distant shore. As the American writer H.L. Mencken once remarked, for every complex problem there is a solution that is neat, plausible, and wrong. Our proposals in this paper have attempted to take seriously this cautionary wisdom.

# **Acknowledgment**

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### **Notes**

- 1. We will use the term "reproductive materials" to include fetal material, and techniques for the medical application of fetal tissues and organs for therapeutic purposes will also be included under the general rubric of the "technologies." We would also like to make clear one particular assumption that we will maintain throughout this study. Currently it is not technologically possible to preserve ova, although it is possible to preserve sperm (by a method known as "cryopreservation," or "freezing"). We will assume that the preservation of ova will soon be possible, and we will base our analysis and recommendations on this assumption.
- 2. M.J. Radin, "Market-Inalienability," Harvard Law Review 100 (1987): 1849-1937.
- 3. See K. Banks, "Baby Chase," Equinox 10 (May-June 1991): 76ff.
- 4. W.D. Mosher and W.F. Pratt, "Fecundity and Infertility in the United States, 1965-88," Advance Data From Vital and Health Statistics of the National Center for Health Statistics (No. 192)(4 December 1990).
- 5. See Banks supra, note 3.
- 6. Some theorists (such as the Catholic Church and some essentialists and radical contingency theorists) take the position that society as a whole is implicated by the activities of its members, and the activities of individuals cannot be understood outside of their social context. By this reasoning, separating supply, demand, and third party interests and placing some social interests in the "third party" category is an artificial distinction. See, for example, Congregation for the Doctrine of the Faith, Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day (Vatican City: 1987), 12; C.R. Sunstein, "Legal Interference with Private Preferences," University of Chicago Law Review 53 (1986): 1129-74; Sunstein, "Preferences and Politics," Philosophy & Public Affairs 20 (1991): 3-34; and C. Pateman, The Sexual Contract (Stanford: Stanford University Press, 1988). These views will be discussed in greater detail in Part 3.
- 7. In the "third parties" category, we have situated not only some social interests but also the "interests" of the reproductive material itself and the interests of the child. This is somewhat controversial, as one's moral views about the nature and value of reproductive material will influence what type of interest to recognize or whether to recognize any interest at all. Another issue is the question of where to situate society's interest: persons who believe that society plays a role in creating

the demand for the technologies might place society in the "demand" category. See, for example, S. Franklin, "Deconstructing 'Desperateness': The Social Construction of Infertility in Popular Representations of New Reproductive Technologies," in *The New Reproductive Technologies*, ed. M. McNeil, I. Varcoe, and S. Yearley (London: Macmillan, 1990). These issues are discussed in Part 3.

- 8. We recognize that these are not the only procedures involving new reproductive technologies. We have chosen these because they are among the more commonly performed techniques.
- 9. This category also includes common-law husbands and other male partners who are in relationship with the woman (i.e., are not "donors").
- 10. Injection of sperm directly into the uterus does involve some technical expertise, i.e., the process of sperm "washing."
- 11. Some feminists point out that DI has "radical" implications for enabling women to have children without male involvement. See, for example, S. Brodribb, "Off the Pedestal and Onto the Block? Motherhood, Reproductive Technologies, and the Canadian State," Canadian Journal of Women and the Law 1 (1986): 407-23; and M.A. Coffey, "Of Father Born: A Lesbian Feminist Critique of the Ontario Law Reform Commission Recommendations on Artificial Insemination," Canadian Journal of Women and the Law 1 (1986): 424-33.
- 12. R. Snowden and G.D. Mitchell, *The Artificial Family* (London: George Allen and Unwin, 1981), 30, make the interesting point that adoption actually gives social parents a better opportunity to assess the child's physical and psychological characteristics than does DI: the adopted child may be seen *ex ante*, but the DI child will be a product of a genetic interaction between the genetic/gestational/social mother and the donor, the results of which are not necessarily predictable.
- 13. U.S. Congress, Office of Technology Assessment, *Infertility: Medical and Social Choices* (Washington, DC: Government Printing Office, 1988), 248 (hereafter "OTA").
- 14. A.M. Capron and M.J. Radin, in their article "Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood," *Law, Medicine and Health Care* 16 (1988), 39, cite an average payment as \$30-50 (U.S.) per ejaculation.
- 15. In the past, medical students have been used as donors. Some would suggest that these young men are entering a profession with ideals about helping to remedy medical problems, and when asked by respected members of the profession to participate in DI, they may have difficulty in refusing (and later regret their decision). See Snowden and Mitchell, *supra*, note 12, 68.
- 16. Canadian Fertility and Andrology Society and Society of Obstetricians and Gynaecologists of Canada, Combined Ethics Committee, Robert L. Reid, Chair, Ethical Considerations of the New Reproductive Technologies (Toronto: Ribosome Communications, 1990), 22 (hereafter "Reid"), and S.A. Garcia, "Reproductive Technology for Procreation, Experimentation, and Profit: Protecting Rights and Setting Limits," Journal of Legal Medicine 11 (1990), 13-14.
- 17. This process may enable post-menopausal women to gestate and give birth to a child. C. Gorman, P. Cole, and B. Dolan, "How Old Is Too Old?" *Time* (30 September 1991): 60.
- 18. See, e.g., OTA, supra, note 13, and Reid, supra, note 16, 17.

- 19. J. Glover et al., Ethics of New Reproductive Technologies: The Glover Report to the European Commission (DeKalb: Northern Illinois University Press, 1989), 43.
- 20. See, e.g., Z. Shoham, A. Zosmer, and V. Insler, "Early Miscarriage and Fetal Malformations After Induction of Ovulation (by Clomiphene Citrate and/or Human Menotropins), IVF, and GIFT," *Fertility and Sterility* 55 (1991), 6.
- 21. Reid, supra, note 16, 10.
- 22. A more controversial possibility is that of sex selection: tests may reveal the sex of the zygote, and it can be rejected if it is at risk of having a sex-linked disorder (or if it is a sex that the parent[s] do not want). For a brief discussion of the medical indications for sex selection, see Reid, *supra*, note 16, 46-47.
- 23. We will use the term "pre-embryo" throughout this paper to refer to the conceptus during the first 14 days after fertilization. We adopt the term "pre-" solely for purposes of convenience and consistency with much of the literature. We have no intention of formulating or expressing any ethical, scientific, or moral views as to the status of the conceptus during this period.
- 24. See, e.g., Medical Research International, Society for Assisted Reproductive Technology, and American Fertility Society, "IVF-Embryo Transfer (IVF-ET) in the United States: 1989 Results from the IVF-ET Registry," Fertility and Sterility 55 (1991): 14-23; and discussion in Church of England, Working Party on Human Fertilisation and Embryology of the Board for Social Responsibility, Personal Origins (London: CIO, 1985), 27ff.
- 25. Reid, supra, note 16, 10.
- 26. A less common technique would be the use of uterine lavage, to "flush out" a pre-embryo that has already been fertilized in vivo.
- 27. The term "gestational services" is used to describe arrangements whereby one or more persons commission a woman to gestate a fetus to term and to transfer the fetus to the commissioner(s) shortly after the birth. This broad definition includes both traditional "surrogacy" (which we term "pre-conception agreements") and situations where the gestational mother is not genetically related to the conceptus ("pre-embryo gestation and transfer"). Both of these terms are explained in more detail below. By using the word "services" in connection with gestation, we do not intend to suggest that gestation is a service like any other or that we are beginning with the assumption that it is acceptable to commodify gestational "services." These issues will be thoroughly discussed later, particularly in Part 4.
- 28. R.H. Blank, Regulating Reproduction (New York: Columbia University Press, 1990), 75.
- 29. Couples would be unlikely to donate unused healthy pre-embryos unless they had either achieved their goal of pregnancy or decided not to continue in the attempt.
- 30. M.B. Mahowald, J. Silver, and R.A. Ratcheson, "The Ethical Options in Transplanting Fetal Tissue," *Hastings Center Report* 17 (February 1987), 10.
- 31. B. Dickens, "Fetal Tissue Transplantation," *Transplantation/Implantation Today* 6 (July 1989): 33-41.
- 32. M.B. Mahowald, "Neural Fetal Tissue Transplantation: Should We Do What We Can Do?" *Neurologic Clinics* 7 (4)(1989), 749.

- 33. Mahowald et al., supra, note 30, 13.
- 34. A. Fine, "The Ethics of Fetal Tissue Transplants," Hastings Center Report 18 (June-July 1988), 6.
- 35. J.A. Robertson, "Fetal Tissue Transplants," Washington University Law Quarterly 66 (1988), 471.
- 36. B. Burlingame, "Commercialization in Fetal-Tissue Transplantation: Steering Medical Progress to Ethical Cures," *Texas Law Review* 68 (1989), 221.
- 37. See, generally, J. Gray, *Liberalism* (Minneapolis: University of Minnesota Press, 1986).
- 38. J.S. Mill, On Liberty (New York: Bobbs Merrill, 1936), chap. 5, para. 11.
- 39. See, e.g., R. Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974).
- 40. Theories of "positive liberty" attempt to address this concern and other concerns associated with classical liberalism. Positive or "revisionist" liberalism is discussed below.
- 41. See A. Wertheimer, Coercion (Princeton: Princeton University Press, 1987).
- 42. See M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, forthcoming), chap. 5.
- 43. Mill, supra, note 38, chap. 1, para. 9.
- 44. See Trebilcock, supra, note 42, chap. 3.
- 45. J.S. Mill, The Subjection of Women (London: Longmans, 1869).
- 46. J. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth," *Virginia Law Review* 60 (1983): 405-64; Robertson, "Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction," *Southern California Law Review* 59 (1986), 942; Robertson, "Procreative Liberty, Embryos, and Collaborative Reproduction," *Women & Health* 13 (1987): 179-94.
- 47. See, e.g., L.B. Andrews, "Alternative Modes of Reproduction," in *Reproductive Laws for the 1990s*, ed. S. Cohen and N. Taub (Clifton: Humana Press, 1989); Andrews, "Control and Compensation: Laws Governing Extracorporeal Generative Materials," *Journal of Medicine and Philosophy* 14 (1989): 541-60.
- 48. See C. Shalev, *Birth Power: The Case for Surrogacy* (New Haven: Yale University Press, 1989); L. Andrews, "Surrogate Motherhood: The Challenge for Feminists," *Law, Medicine and Health Care* 16 (1988): 72-80.
- 49. See, e.g., R. Rowland, "Motherhood, Patriarchal Power, Alienation and the Issue of 'Choice' in Sex Preselection," in *Man-Made Women: How New Reproductive Technologies Affect Women*, ed. G. Corea et al. (Bloomington: Indiana University Press, 1987), 74; W. Kymlicka, "Rethinking the Family," *Philosophy & Public Affairs* 20 (1991): 77-97.
- 50. Shalev, supra, note 48, 164. For a Marxist argument to similar effect, see J. Ollenburger and J. Hamlin, "All Birthing Should be Paid Labor," in *On the Problem of Surrogate Parenthood*, ed. H.W. Richardson (Lewiston: Edwin Mellen Press, 1987).
- 51. These concepts are developed more fully in M.J. Trebilcock, "Economic Analysis of Law," in *Canadian Perspectives on Legal Theory*, ed. R. Devlin (Toronto: Emond Montgomery, 1991).

- 52. Trebilcock, supra, note 42, chap. 4.
- 53. Ibid., chap. 4.
- 54. See G. Calabresi, "The Pointlessness of Pareto: Carrying Coase Further," Yale Law Journal 100 (1991): 1211-37.
- 55. R.A. Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981), chap. 4.
- 56. See Symposium issues, Hofstra Law Review 8 (1980) and Journal of Legal Studies 9 (1980).
- 57. See, e.g., B.K. Rothman, *Recreating Motherhood* (New York: W.W. Norton, 1989), 140ff.
- 58. See Gray, supra, note 37, 32.
- 59. D. Dyzenhaus, "Liberalism, Autonomy and Neutrality," *University of Toronto Law Journal* 42 (1992), 375.
- 60. See Gray, supra, note 37, 57, 58.
- 61. For a discussion of the indeterminacies entailed in a positive theory of liberalism, and also of reasons why liberalism must address the question of inequalities in prior endowments, see Trebilcock, *supra*, note 42.
- 62. Nozick, *supra*, note 39; I. Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (London: Oxford University Press, 1969).
- 63. J. Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971).
- 64. An argument, made by Richard Posner among others, is that unconstrained commodification impacts favourably on the poor because it increases their already meagre opportunity set. This argument will be discussed below.
- 65. Pateman, supra, note 6.
- 66. S.M. Okin, "Reason and Feeling in Thinking About Justice," in *Feminism and Political Theory*, ed. C. Sunstein (Chicago: University of Chicago Press, 1990).
- 67. See Congregation for the Doctrine of the Faith, supra, note 6, 12.
- 68. Gray, supra, note 37, 48.
- 69. Pateman, supra, note 6, 52-53.
- 70. D.J. Kevles, *In the Name of Eugentcs* (Berkeley: University of California Press, 1986).
- 71. See, e.g., M. Daly and M. Wilson, Sex, Evolution, and Behavior, 2d ed. (Boston: Wadsworth, 1983); R.D. Alexander, The Biology of Moral Systems (Hawthorne: Aldine De Gruyter, 1987); C. Crawford, M. Smith, and D. Krebs (eds.), Sociobiology and Psychology (Hillsdale: Lawrence Erlbaum Associates, 1987); P.W. Strahlendorf, "Evolutionary Jurisprudence: Darwinian Theories in Judicial Science," S.J.D. Thesis, University of Toronto Law School, 1991.
- 72. Radin, supra, note 2.
- 73. See, e.g., Rothman, supra, note 57; M.A. Ryan, "The Argument for Unlimited Procreative Liberty: A Feminist Critique," *Hastings Center Report* 20 (July-August 1990): 6-12; K.P. Morgan, "Of Woman Born? How Old-Fashioned! New Reproductive

- Technologies and Women's Oppression," in *The Future of Human Reproduction*, ed. C. Overall (Toronto: Women's Press, 1984).
- 74. See, e.g., J.G. Raymond, "Fetalists and Feminists: They Are Not the Same," in *Made to Order: The Myth of Reproductive and Genetic Progress*, ed. P. Spallone and D.L. Steinberg (Oxford: Pergamon Press, 1987).
- 75. G. Corea, The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs (New York: Harper and Row, 1985), 299.
- 76. Pateman, supra, note 6, 193.
- 77. Gray, supra, note 37, 49.
- 78. See, e.g., J. Finnis, Natural Law and Natural Rights (New York: Oxford University Press, 1980).
- 79. See, e.g., J. Feinberg, *Harmless Wrongdoing* (New York: Oxford University Press, 1988), chap. 29A.
- 80. P. Devlin, The Enforcement of Morals (London: Oxford University Press, 1965).
- 81. H.L.A. Hart, Law, Liberty and Morality (Stanford: Stanford University Press, 1963).
- 82. See M. Friedman, "Feminism and Modern Friendship: Dislocating the Community," in *Feminism and Political Theory*, ed. C.R. Sunstein (Chicago: University of Chicago Press, 1990).
- 83. M.J. Sandel, Liberalism and the Limits of Justice (New York: Cambridge University Press, 1982).
- 84. A.C. MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981).
- 85. C. Taylor, Philosophy and the Human Sciences: Philosophical Papers 2 (New York: Cambridge University Press, 1986), esp. "Atomism," 190; Taylor, Sources of the Self (Cambridge: Harvard University Press, 1989); Taylor, The Malaise of Modernity (Toronto: Anansi, 1991).
- 86. M.A. Glendon, Rights Talk: The Impoverishment of Political Discourse (New York: Free Press, 1991); A. Etzioni, The Moral Dimension (New York: Free Press, 1988); R.N. Bellah et al., Habits of the Heart (Berkeley: University of California Press, 1985); Bellah et al., The Good Society (New York: Alfred A. Knopf, 1991).
- 87. C.B. Macpherson, *The Political Theory of Possessive Individualism* (London: Oxford University Press, 1962).
- 88. For a review of theories of adaptive or endogenous preferences see Sunstein, "Legal Interference," *supra*, note 6; Sunstein, "Preferences and Politics," *supra*, note 6.
- 89. Debra Satz asks a similar question in her paper on "surrogacy." Satz writes, "We have to ask: What kinds of work and family relations and environments best promote the development of the deliberative capacities needed to support democratic institutions?" Satz, "Markets in Women's Reproductive Labor," *Philosophy & Public Affairs* 21 (1992), 131.
- 90. E. Mack, "Dominos and the Fear of Commodification," in *Markets and Justice*, ed. J.W. Chapman and R. Pennock (New York: New York University Press, 1989), 223.

- 91. See, e.g., S. Sherwin, "No Longer Patient: Feminism and Medical Ethics," Feminism and Law Workshop, University of Toronto Law School, 7 February 1992; J.G. Raymond, "Reproductive Gifts and Gift Giving: The Altruistic Woman," *Hastings Center Report* 20 (November-December 1990): 7-11.
- 92. C. Gilligan, In a Different Voice (Cambridge: Harvard University Press, 1982).
- 93. C. Mackinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1989), 39.
- 94. R. Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (London: Allen and Unwin, 1970); for a rejoinder, see K. Arrow, "Gifts and Exchanges," *Philosophy & Public Affairs* 1 (1972): 342-62.
- 95. Raymond, supra, note 91.
- 96. Mill, supra, note 45.
- 97. See, e.g., Pateman, *supra*, note 6; Rothman, *supra*, note 57; L.R. Woliver, "New Reproductive Technologies: Challenges to Women's Control of Gestation and Birth," in *Biomedical Technology and Public Policy*, ed. R.H. Blank and M.K. Mills (Westport: Greenwood Press, 1990).
- 98. Rothman, supra, note 57, 140-52; C. Overall, Ethics and Human Reproduction (Boston: Allen and Unwin, 1987), 52.
- 99. See, e.g., U. Franklin, *The Real World of Technology* (Toronto: C.B.C. Enterprises, 1990); Taylor, *The Malatse of Modernity, supra*, note 85; M. Adas, *Machines as the Measure of Men* (Ithaca: Cornell University Press, 1989); J. Ellul, *The Technological Society* (New York: Vintage Books, 1964).
- 100. See, e.g., M. McNeil, "Reproductive Technologies: A New Terrain for the Sociology of Technology," in *The New Reproductive Technologies*, ed. M. McNeil, I. Varcoe, and S. Yearley (London: Macmillan, 1990); J. Murphy, "Egg Farming and Women's Future," in *Test-Tube Women*, ed. R. Arditti, R.D. Klein, and S. Minden (Boston: Pandora Press, 1984).
- 101. C. Mackinnon, Toward a Feminist Theory of the State (Cambridge: Harvard University Press, 1989), 249.
- 102. Pateman, supra, note 6, 233.
- 103. See, e.g., R. Rowland, who writes, "If these technologies were in the hands of women whose bodies they most intimately affect, we may be able to utilize them to free women and give them new choices. But past experience teaches us that the control of women's bodies is a continual battleground of the sexes." Rowland, supra, note 49, 80.
- 104. Radin, supra, note 2.
- 105. For a discussion of this situation see the Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (Toronto: Ministry of the Attorney General, 1985), vol. 1, 60-62 (hereafter "Ontario LRC").
- 106. Law Reform Commission of Saskatchewan, Tentative Proposals for a Human Artificial Insemination Act (Saskatoon: 1981), 3-14.
- 107. For a discussion of the concept of having an "interest" rather than a property right in reproductive material, see P. Matthews, "Whose Body? People as Property," *Current Legal Problems 1983* (1983), 193. See also discussion in the Ontario LRC,

- supra, note 105, 88-89, and C. Perry and L.K. Schneider, "Cryopreserved Embryos: Who Shall Decide Their Fate?" Journal of Legal Medicine 13 (1992), 477-88.
- 108. For a discussion of the significance to be attached to the pre-embryo's potential to become a human being, see Glover et al., *supra*, note 19, 97ff.
- 109. Ibid., 32-34. We would reject the Ontario Law Reform Commission's suggestion that "an older, mature minor, aged sixteen or seventeen" be permitted to donate material, as many men and women under the age of 18 are unlikely to have reached a full appreciation of the significance of becoming genetic "parents." Ontario LRC, supra, note 105, vol. 1, 163.
- 110. See, e.g., "Eugenic Artificial Insemination: A Cure for Mediocrity?" *Harvard Law Review* 94 (1981): 1850-70.
- 111. Reid, supra, note 16, 16.
- 112. Burlingame, supra, note 36, 221.
- 113. The Glover Report takes note of the fact that demand can be created, particularly by suppliers. See Glover, supra, note 19, 86.
- 114. For a discussion of issues and possible conflicts arising out of the storage of pre-embryos, see H.W. Jones, Jr., "Cryopreservation and Its Problems," *Fertility and Stertlity* 53 (1990): 780-84.
- 115. For a discussion of this issue from a liberal autonomy perspective, see J.A. Robertson, "Resolving Disputes over Frozen Embryos," *Hastings Center Report* 19 (November-December 1989): 7-12.
- 116. See, e.g., L.B. Andrews, "My Body, My Property," *Hastings Center Report* 16 (October 1986): 28-38.
- 117. Ibid.
- 118. See, e.g., L.B. Andrews, "Alternative Modes of Reproduction," *supra*, note 47, 361.
- 119. Rowland, *supra*, note 49, 75. Rowland also expresses concerns about the social context in which the technologies are used.
- 120. J.A. Robertson, "Minimize Government Regulation," in *Hi-Tech Babies: Alternative Reproductive Technologies*, ed. G.E. McCuen (Hudson: Gary E. McCuen Publications, 1990), 127.
- 121. See, e.g., Robertson, supra, note 115.
- 122. See, e.g., J.H. Hollinger, "From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction," *University of Michigan Journal of Law Reform* 18 (1985), 882-86, and L.B. Andrews, "Prohibiting New Reproductive Technologies: The Counterpoint," in *Hi-Tech Babies: Alternative Reproductive Technologies*, ed. G.E. McCuen (Hudson: Gary E. McCuen Publications, 1990), 70.
- 123. This is the position taken in the Reid report, supra, note 16, 33.
- 124. For a discussion of this point, see Glover, supra, note 19, at 48-51.
- 125. Robertson, "Procreative Liberty, Embryos," supra, note 46, 188. See also M.A. Warren, "Is IVF Research a Threat to Women's Autonomy?" in Embryo Expertmentation, ed. P. Singer et al. (Cambridge: Cambridge University Press, 1990), 125. Warren writes, "Complete reproductive freedom is a utopian ideal; but partial

reproductive freedom is better than none. The long-term value to women of IVF and other new reproductive technologies remains to be seen. For that very reason, it is vital that individual women's decisions about the use of IVF be respected. Neither physicians nor legislators have the wisdom to override women's own informed judgements about matters so central to their reproductive lives" (135).

- 126. See Robertson, "Procreative Liberty, Embryos," supra, note 46, 182-85.
- 127. For a criticism of this perspective, see Franklin, supra, note 7, 200.
- 128. Autonomy theorists would likely approve of the Ontario Law Reform Commission's position that commercial gamete banks, which would sell gametes and embryos at a "reasonable profit," be permitted to operate in the private sector, subject to government licensing and operating standards. Ontario LRC, *supra*, note 105, vol. 2, 171-73.
- 129. For a discussion of these issues, see Robertson, supra, note 115.
- 130. Both the Ontario Law Reform Commission and the Warnock Report would permit research on pre-embryos. The Ontario report explicitly recommends that private interests be permitted to perform such research, subject to approval by the Ministry of Health and an ethical review. See Ontario LRC, supra, note 105, vol. 2, 207-12; and M. Warnock, A Question of Life: The Warnock Report on Human Fertilisation and Embryology (Oxford: Basil Blackwell, 1985).
- 131. See Calabresi, supra, note 54.
- 132. For the purpose of evaluating Pareto efficiency in this exchange context, we will assume that, under the current state of affairs, demanders obtain materials through the health care system at little or no cost to themselves, and with minimal ability to specify characteristics of the materials.
- 133. R.A. Posner, "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood," *Journal of Contemporary Health Law and Policy* 5 (1989), 22. See also R.A. Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1992), 412 and chap. 15 generally.
- 134. The need to regulate research interests has been recognized by the Law Reform Commission of Canada's *Biomedical Experimentation Involving Human Subjects*, Working Paper 61 (Ottawa: LRC, 1989), 46-55; the Ontario LRC, *supra*, note 105, vol. 2, 207-17; and Warnock, *supra*, note 130, among others.
- 135. See, e.g., J. Murphy, "From Mice to Men? Implications of Progress in Cloning Research," in *Test-Tube Women: What Future for Motherhood?* ed. R. Arditti, R.D. Klein, and S. Minden (Boston: Pandora Press, 1989), 76; and S. Minden, "Designer Genes: A View from the Factory," in *Test-Tube Women*, ibid.
- 136. The Glover Report briefly discusses certain of these issues. See Glover, *supra*, note 19, 139-40.
- 137. A brief example of this calculus is provided in ibid., 27-29.
- 138. The Warnock Report provides an example of a utilitarian calculation in the context of allowing research on early embryos. See Warnock, supra, note 130, ix-xv.
- 139. Glover, supra, note 19, 26-27.
- 140. This is a concern for feminists writing from a distributive justice perspective. See, e.g., H. Bryant, The Infertility Dilemma: Reproductive Technologies and

- Prevention (Ottawa: Canadian Advisory Council on the Status of Women, 1990). T.A. Shannon, in his article "In Vitro Fertilization: Ethical Issues," Women & Health 13 (1987), 155, suggests that the cost of the technologies in terms of the allocation of social resources may be excessive if only a small portion of the population will be able to take advantage of them (161-62).
- 141. This is also in keeping with the "justice" principle in United States National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (Washington, DC: 1978), 5.
- 142. M.D. Bayles, *Reproductive Ethics* (Englewood Cliffs: Prentice-Hall, 1984); and E.M. Landes and R.A. Posner, "The Economics of the Baby Shortage," *Journal of Legal Studies* 7 (1978): 323-48. See also Posner, *Sex and Reason*, *supra*, note 133, 412.
- 143. Posner, "The Ethics and Economics," *supra*, note 133, 25-26. See also Posner, *Sex and Reason*, *supra*, note 133, 412. In Posner's words, "[w]hat is probably true is that most women who sold their parental rights would be less prosperous than the women who bought them. But this means that parental-rights selling would be wealth-equalizing."
- 144. This concern leads feminist Heather Bryant to suggest outlawing all payment, so as to "diminish the possibility of women undertaking these actions out of financial desperation, rather than free choice." Bryant, supra, note 140, 28.
- 145. There is an argument made by Posner, among others, that an unconstrained market would *benefit* less well off demanders because financial inducements would attract more suppliers onto the market, and suppliers would compete down to (marginally above) cost, thereby making more materials and services available and at a lower cost. However, this argument is problematic from a distributive justice perspective on both the supply and demand sides. It will be discussed in greater detail in Part 5, below.
- 146. P.H. Schuck, "Government Funding for Organ Transplants," *Journal of Health Politics, Policy and the Law* 14 (1989): 169-90.
- 147. See, e.g., C. Crowe, "Whose Mind over Whose Matter? Women, In Vitro Fertilisation and the Development of Scientific Knowledge," in *The New Reproductive Technologies*, ed. M. McNeil, I. Varcoe, and S. Yearley (London: Macmillan, 1990), 53.
- 148. For a discussion of this position, see J.M. Haas, "The Inseparability of the Two Meanings of the Marriage Act," in "Proceedings of the Bishops' Workshop on Reproductive Technology: Marriage and the Church,'" held 1-5 February 1988, Dallas, Texas, Reproductive Technologies, Marriage and the Church (Braintree: Pope John XXIII Medical-Moral Research and Education Center, 1988), 89.
- 149. Congregation for the Doctrine of the Faith, supra, note 6, 12. The Congregation writes that "the fruit of human generation, from the first moment of its existence, that is to say from the moment the zygote has formed, demands the unconditional respect that is morally due to the human being in his bodily and spiritual totality" (ibid., 13-14).
- 150. For an example of a conservative communitarian perspective on the use of donor materials, see G.R. Dunstan, "Moral and Social Issues Arising from A.I.D.,"

in Law and Ethics of A.I.D. and Embryo Transfer, Ciba Foundation Symposium 17 (new series) (New York: Associated Scientific Publishers, 1973), 47.

- 151. See, e.g., Brodribb, supra, note 11, 417; and Coffey, supra, note 11.
- 152. See, e.g., Satz, supra, note 89.
- 153. Franklin, supra, note 7, 200.
- 154. Rowland, supra, note 49, 74.
- 155. For a description of some women's experiences with IVF, see L.S. Williams, "No Relief Until the End: The Physical and Emotional Costs of In Vitro Fertilization," in *The Future of Human Reproduction*, ed. C. Overall (Toronto: Women's Press, 1989), 120.
- 156. See, e.g., D.C. Poff, "Reproductive Technology and Social Policy in Canada," in *The Future of Human Reproduction*, ed. C. Overall (Toronto: Women's Press, 1989), 216.
- 157. Overall, supra, note 98, 145-60.
- 158. See, e.g., D.L. Steinberg, "The Depersonalisation of Women Through the Administration of 'In Vitro Fertilisation,'" in The New Reproductive Technologies, ed. M. McNeil, I. Varcoe, and S. Yearley (London: Macmillan, 1990), 74; and R.D. Klein, "What's 'New' About the 'New' Reproductive Technologies?" in Man-Made Women: How New Reproductive Technologies Affect Women, ed. G. Corea et al. (Bloomington: Indiana University Press, 1987), 64.
- 159. See, e.g., B. Ehrenreich and D. English, For Her Own Good: 150 Years of the Experts' Advice to Women (New York: Anchor, 1978).
- 160. See, e.g., Rowland, *supra*, note 49, 74. Rowland writes, "The medical profession ... is again using women's bodies for experimentation and using their 'need' (social or otherwise) to have babies. Women, motivated by an intense life crisis over infertility, are manipulated by this situation into full and total support of any technique which will produce those desired children, without consideration of the implications of doing so for women as a social group" (75).
- 161. See Raymond, supra, note 91.
- 162. See, e.g., Corea, supra, note 75, 100-134.
- 163. A. Oakley, "From Walking Wombs to Test-Tube Babies," in *Reproductive Technologies: Gender, Motherhood and Medicine*, ed. M. Stanworth (Minneapolis: University of Minnesota, 1987), 36.
- 164. Renate Duelli Klein writes: "The technodocs have embarked on dissecting and marketing parts of women's bodies: eggs, wombs and embryos. Women are being dismembered split into separate reproductive parts which can be reassembled, perhaps in a different order, perhaps using parts from different women." Klein, supra, note 158, 66.
- 165. Morgan, supra, note 73, 60.
- 166. Steinberg, supra, note 158, 99.
- 167. See, e.g., N. Colodny, "The Politics of Birth Control in a Reproductive Rights Context," in *The Future of Human Reproduction*, ed. C. Overall (Toronto: Women's Press, 1989), 30; and Overall, *supra*, note 98.

- 168. See, e.g., Woliver, supra, note 97, 50-52.
- 169. Klein, supra, note 158, 68-69.
- 170. See, e.g., B.B. Hoskins and H.B. Holmes, "Technology and Prenatal Femicide," in *Test-Tube Women: What Future for Motherhood?* ed. R. Arditti, R.D. Klein, and S. Minden (Boston: Pandora Press, 1984), 237.
- 171. M. Kishwar, "The Continuing Deficit of Women in India and the Impact of Amniocentesis," in *Man-Made Women: How New Reproductive Technologies Affect Women*, ed. G. Corea et al. (Bloomington: Indiana University Press, 1987), 30; and V. Roggencamp, "Abortion of a Special Kind: Male Sex Selection in India," in *Test-Tube Women: What Future for Motherhood?* ed. R. Arditti, R.D. Klein, and S. Minden (Boston: Pandora Press, 1984), 266.
- 172. In the words of Robyn Rowland, "Sex preselection gives men control over the sex of the next generation. We do not live in an ideological vacuum. We do live in a society in which men make the decisions. Within the dyadic and social power structures, the coercive power of man could be used to ensure the sex of *thetr* choice in offspring." Rowland, *supra*, note 49, 84.
- 173. Robert H. Blank, though not writing from a feminist perspective, states the point well: "This emphasis on technological 'perfection' raises questions concerning the purpose of children in this generation. It is not surprising that terms such as 'quality control' over the reproductive process and children as 'products' of particular techniques are commonplace. With the increased availability of sex and characteristic selection techniques, motivations for their application must be examined closely. There is a clear danger of viewing children as commodities." Blank, *supra*, note 28, 90.
- 174. Feminist Julie Murphy, *supra*, note 100, 68, outlines the positive and negative potential of what she terms "egg farming."
- 175. See, e.g., Corea, supra, note 75, 250-59.
- 176. Conversely, of course, one could make the argument that if a sufficient quantity of sperm were stockpiled, and sex selection used, women could eliminate men.
- 177. In the words of Robyn Rowland, "If these technologies were in the hands of women whose bodies they most intimately affect, we may be able to utilize them to free women and give them new choices. But past experience teaches us that the control of women's bodies is a continual battleground of the sexes." Rowland, supra, note 49, 80.
- 178. See, e.g., L. Doyal, "Infertility a Life Sentence? Women and the National Health Service," in *Reproductive Technologies: Gender, Motherhood and Medicine*, ed. M. Stanworth (Minneapolis: University of Minnesota Press, 1987), 188-90. For a discussion of lesbian women's exclusion from use of supplied materials, see Coffey, *supra*, note 11.
- 179. Re Baby M, 109 N.J. 396, 537 A. 2d 1227 (S.C. New Jersey) (1988). The Supreme Court of New Jersey (Wilentz C.J.) overturned the Baby M trial court decision of Sorkow J., 525 A. 2d 1128 (N.J. Super. Ch. 1987). While Sorkow J. had held the "surrogacy" contract at issue to be enforceable, Wilentz C.J. found it to be void because it conflicted with state laws on adoption, in particular the provisions prohibiting both the transfer of money in connection with adoption and the

irrevocable surrender of a child's custody. Wilentz C.J. also found the contract to be against public policy.

- 180. C. Lawson, "Couples' Own Embryos Used in Birth Surrogacy," *The New York Times* (12 August 1990), 1, column 1.
- 181. *Anna J. v. Mark C.*, No. G010225, Super Ct. Nos. X-633190 and AD-57638, Daily Appellate Report 12433 (California Court of Appeal, Fourth Appellant District, Division Three, Filed 8 October 1991). In this decision, the birth mother of the child was held *not* to be its "natural" mother, and custody was granted to the individuals who had commissioned the child.
- 182. Rothman, supra, note 57.
- 183. Rothman writes: "For a man, what makes the child hts is his seed. For women, what makes the child ours is the nurturance, the work of our bodies." Ibid., 44.
- 184. In this context, many feminists argue that "parental relations are primarily social arrangements, not reducible to their genetic origins." See W. Chavkin, B.K. Rothman, and R. Rapp, "Alternative Modes of Reproduction: Other Views and Questions," in *Reproductive Laws for the 1990s*, ed. S. Cohen and N. Taub (Clifton: Humana Press, 1989), 408. In contrast, consider the decision in *Anna J. v. Mark C., supra*, note 181, where the court held: "We must 'resolve' the question of Anna's claim to maternity as we would resolve the question of a man's claim to (or liability for) paternity when blood tests positively exclude him as a candidate" (12435).
- 185. See K.H. Rothenberg, "Gestational Surrogacy and the Health Care Provider: Put Part of the 'IVF Genie' Back into the Bottle," *Law, Medicine and Health Care* 18 (1990), 346.

186. Ibid.

- 187. Children's Law Reform Act, R.S.O. 1990, c. C.12, s.1(1).
- 188. See, e.g., G.J. Annas, "Regulating the New Reproductive Technologies," in *Reproductive Laws for the 1990s*, ed. S. Cohen and N. Taub (Clifton: Humana Press, 1989), 414. Annas believes that a law should be drafted ensuring that a birth mother is irrefutably held to be the mother of the child: "This is because of her gestational contribution to the child, and the fact that she will definitely be present at the birth, easily and certainly identifiable, and available to care for the child." See also Annas, "The Baby Broker Boom," in *Ethical Issues in the New Reproductive Technologies*, ed. R.T. Hull (Belmont: Wadsworth, 1990), and Annas, "Fairy Tales Surrogate Mothers Tell," *Law, Medicine and Health Care* 16 (1988): 27-33.
- 189. We use the term "individuals" and not "parents" because we believe that to introduce the notion of parenthood (itself an uncertain term in this debate) at this point would only complicate our discussion. In using the plural form "individuals," we do not mean to imply that there might not be just one commissioning individual.
- 190. E.S. Anderson, "Is Women's Labor a Commodity?" *Philosophy & Public Affairs* 19 (1990), 78.
- 191. The fact that one of the "buyers" in the gestational service contract is often the genetic father of the child makes the "baby-selling" label more problematic here than it is in the adoption context. In the trial judgment in *Baby M*, Sorkow J. wrote: "At birth, the father does not purchase the child. It is his own biological

- genetically related child. He cannot purchase what is already his" (Baby M (1987), supra, note 179, 1157).
- 192. K. Selick, "The Case for Baby Buying," Canadian Lawyer 15 (February 1991): 44.
- 193. See, e.g., Landes and Posner, supra, note 142.
- 194. See K.M. Sly, "Baby-Sitting Consideration: Surrogate Mother's Right to 'Rent Her Womb' for a Fee," *Gonzaga Law Review* 18 (1982/83): 539-65.
- 195. Baby M, (1988), supra, note 179, Wilentz C.J. 1240. See also Posner, Sex and Reason, supra, note 133, 410ff. Posner writes: "A mother who surrenders her parental rights for a fee is not selling her baby; babies are not chattels, and cannot be bought and sold. She is selling her parental rights."
- 196. L. Stone, "Neoslavery 'Surrogate' Motherhood Contracts v. The Thirteenth Amendment," Law and Inequality 6 (1988): 63-73. A.L. Allen, "Surrogacy, Slavery, and the Ownership of Life," Harvard Journal of Law & Public Policy 13 (1990): 139-49.
- 197. Keith Cunningham argues that existing "surrogacy" arrangements are clearly personal service contracts, for the women who engage in them are not just "renting their wombs" but are performing a valuable service themselves. See K.J. Cunningham, "Surrogate Mother Contracts: Analysis of a Remedial Quagmire," *Emory Law Journal* 37 (1988), 742.
- 198. Our definition of these arrangements is very similar to that used by the New South Wales Law Reform Commission in its report, *Artificial Conception Surrogate Motherhood* (Sydney: 1988), 7.
- 199. Many of the arguments in the following pages are drawn from: M.J. Trebilcock and R. Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective," *University of Toronto Law Journal* 41 (1991): 533-90.
- 200. Both heterosexual and homosexual.
- 201. In Anna J. v. Mark C. (supra, note 181), the court held that "genetics is a powerful factor in human relationships. The fact that another person is, literally, developed from a part of oneself can furnish the basis for a profound psychological bond" (12437).
- 202. Baby M, (1988), supra, note 179, 1235. Peter Schuck has pointed out that gestational service contracts in fact contain an additional advantage over adoption contracts, beyond the genetic link involved, since it is possible for the commissioning individuals to know more about the gestational mother in the case of a gestational agreement than they would in the case of a conventional adoption. See P.H. Schuck, "The Social Utility of Surrogacy," Harvard Journal of Law & Public Policy 13 (1990), 133.
- 203. Though we note that a woman's use of artificial insemination is not necessarily a reflection of a desire to perpetuate her genes. It may be the result instead of numerous other desires: to experience gestational motherhood; to avoid the embarrassment caused to her male partner by friends and family discovering his infertility; to enable childbirth in a lesbian relationship; to avoid waiting in an adoption queue.

- 204. This was apparently part of Mary Beth Whitehead's desire in the *Baby M* case. See *Baby M* (1988), *supra*, note 179, Wilentz C.J., 1236.
- 205. M. Freeman, "Is Surrogacy Exploitative?" in *Legal Issues in Human Reproduction*, ed. S. McLean (Brookfield: Gower, 1989). Note that abortion is a choice that is often confronted by women in desperate circumstances and lacking full information of the psychic trauma that may be subsequently entailed. These considerations are rarely recognized as invalidating the right of women to make the decision to abort, though they are reasons similar to those advanced as to why women should not be allowed to enter into gestational service contracts.
- 206. For a feminist argument that such freedom should be recognized, see Andrews, *supra*, note 48. More generally, see L.B. Andrews, *Between Strangers* (New York: Harper and Row, 1989). Most recently, see L.B. Andrews, "Policy and Procreation: The Case of Surrogate Motherhood," Feminism and Law Workshop Series, University of Toronto, Faculty of Law, 27 March 1992. In response to Andrews' argument on this issue, feminist Susan Sherwin has suggested that women's individual "choices" ought to be viewed as part of a larger set of opportunities that either promote or reduce women's equality. In Sherwin's view, the abortion choice, when seen in its broader context, is one that enhances women's reproductive autonomy, whereas the choice to gestate a child for payment (when viewed in context) in fact reduces women's equality in the reproductive sphere. Sherwin made this comment at the Conference on Law and Contemporary Affairs, University of Toronto, Faculty of Law, February 1993.
- 207. In the *Baby M* trial, Sorkow J. took this argument about the rights of women in another direction: "Currently, males may sell their sperm. The 'surrogate father' sperm donor is legally recognized in all states. The surrogate mother is not. If a man may offer the means for procreation then a woman must equally be allowed to do so. To rule otherwise denies equal protection of the law to the childless couple, the surrogate, whether male or female, and the unborn child." See *Baby M*, 525 A. (1987), *supra*, note 179, Sorkow J., 1165. Martha Hall makes a different argument for respecting a gestational mother's choice in "Rights and the Problem of Surrogate Parenting," *Philosophical Quarterly* 35 (1985): 414-24.
- 208. L. Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements," Law, Medicine and Health Care 16 (1988), 10. Gostin writes: "A human being has a right to contract with another to be paid for the performance of services, even highly personal services." Otherwise she is being deprived of payment for valued labour. See also J.T. Younger, "What the Baby M Case Is Really All About," Law and Inequality 6 (1988), 81, who writes in this context that she is "suspicious of people who and laws which would prevent women from earning money."
- 209. Trebilcock and Keshvani, supra, note 199, 575-76.
- 210. Shalev, supra, note 48, 164. For a Marxist argument to similar effect, see Ollengburger and Hamlin, supra, note 50.
- 211. Trebilcock and Keshvani, supra, note 199, 578.
- 212. R.S.O. 1990, c. C.12, s. 8(1).
- 213. R.S.O. 1990, c. C.11, s. 137.
- 214. For an excellent discussion of this understanding of parenthood, see Shalev, *supra*, note 48, 120-45.

- 215. Gostin, supra, note 208, 9.
- 216. See T.A. Shannon, Surrogate Motherhood (New York: Crossroad, 1988), esp. 53-61, 152-53.
- 217. "The fact that their choice may be conditioned by a created want does not prima facte make it an unacceptable choice," Deborah Poff writes in the different but related context of IVF. See Poff, supra, note 156, 223.
- 218. M.A. Field, Surrogate Motherhood (Cambridge: Harvard University Press, 1990), 50.
- 219. Daly and Wilson, *supra*, note 71; Alexander, *supra*, note 71; Crawford et al., *supra*, note 71. In the *Baby M* trial, Sorkow J. was obviously convinced by some of these perspectives when he wrote that the "intense desire to propagate the species is fundamental. It is within the soul of all men and women regardless of economic status." See *Baby M* (1987), *supra*, note 179, Sorkow J., 1158.
- 220. John Robertson has written a great deal in this context about what he believes to be a guaranteed "right" of "procreative autonomy," meaning that every individual ought to be entitled to pursue whatever type of "collaborative" reproduction they deem to be in their interest. See, e.g., Robertson, "Procreative Liberty, Embryos," supra, note 46. The right to procreate is included, Robertson believes, in the right to privacy contained in the U.S. Constitution. It was upheld by Judge Sorkow in the trial verdict of Baby M. Hall, supra, note 207, supports Robertson's argument, and emphasizes the constitutional rights of a gestational mother over her own body. Similar "rights" arguments are made by M. Balboni in "The Right of Procreative Choice," in Hi-Tech Babies: Alternative Reproductive Technologies, ed. G.E. McCuen (Hudson: Gary E. McCuen Publications, 1990), and Andrews, "Policy and Procreation," supra, note 206. For an excellent critique of Robertson's position see Ryan, supra, note 73.
- 221. Andrews, "Alternative Modes of Reproduction," supra, note 47, 369.
- 222. T. McCormack, "When Is Biology Destiny?" in *The Future of Human Reproduction*, ed. C. Overall (Toronto: Women's Press, 1989), 91.
- 223. This analysis is drawn from Trebilcock and Keshvani, *supra*, note 199, 580. Field, *supra*, note 218, 27, writes that "... to portray surrogacy contracts as representing meaningful choice and informed consent ... reveals an idealized perspective and a failure to take account of realities." Stone, *supra*, note 196, 67-68, writes of the *Baby M* agreement: "Although Mrs. Whitehead may indeed have consented to the contract, it was not, and by its very nature could not have been, an informed consent."
- 224. Note that this coercion need not result from any action on the part of the commissioning individuals. It may ensue simply from the reality of the birth mother's financial situation, which may severely constrain the options available to her.
- 225. In the context of gestational service exchanges, see P. Schuck, "Some Reflections on the Baby M Case," Georgetown Law Journal 76 (1988), 1795, 1800.
- 226. The assumption here is that the financial constraint is not life-threatening. Some liberal autonomy theorists might agree that coercion would be present in a situation where a woman's options were to either gestate a baby for someone else or starve to death.

- 227. Again, see Trebilcock and Keshvani, supra, note 199. For studies on the empirical question of "bonding" between mother and baby, see Reports of Phyllis R. Silverman (Professor of Social Work in Health Care, Massachusetts General Hospital Institute of Health Professionals), for use in the Baby M litigation, 23 October 1986, which finds birth mothers greatly underestimate the degree of grief they will feel from giving up the child — 95 percent of them felt it was worse than they had ever imagined; see also L. Millen and S. Roll, "Solomon's Mothers: A Special Case of Pathological Bereavement," American Journal of Orthopsychiatry 55 (1985): 411-18, in which it is found that birth mothers experience anguish as much as 20 years later; and V.C. Jackson, "Baby Mand the Question of Parenthood," Georgetown Law Journal 76 (1988), 1821, in which she cites numerous studies establishing that many birth mothers severely underestimate the emotional trauma resulting from giving up the child; see also E. Kane, Birth Mother (New York: Harcourt Brace Jovanovich, 1988); but cf. Schuck, supra, note 225, 1799, where he argues that "[t]he risk of subsequent regret is the price we pay for our commitment to personal autonomy and responsibility in the face of uncertainty"; and Posner, "Ethics and Economics," supra, note 133. Consensus on the question of mother-child bonding has by no means been established. On this, see D. McPhee and K. Forest, "Surrogacy: Programme Comparison and Policy Implications," International Journal of Law and the Family 4 (1990), 315.
- 228. The psychological process of bonding begins during pregnancy and is the psychological and emotional experience through which a woman's self-identity transforms into "mother"; see M.S. Cranley, "Development of a Tool for the Measurement of Maternal Attachment During Pregnancy," *Nursing Research* 30 (1981): 281-84. See also Shalev, *supra*, note 48, 120-45.
- 229. For an excellent discussion of the numerous studies establishing the importance of the mother-child relationship during gestation and the legal implications for gestational service exchange, see M.M. Suh, "Surrogate Motherhood: An Argument for Denial of Specific Performance," *Columbia Journal of Law and Social Problems* 22 (1989), 362-71. On page 379 Suh writes that "[b]ecause of the nature of the bonding process ... a birthmother cannot make a 'knowing' or 'informed' waiver of her parental ties prior to birth." Suh believes that such "waivers" must always be considered void.
- 230. Indeed, Gostin, *supra*, note 208, argues exactly this point from a civil libertarian perspective. See also *Surrogate Parenting v. Kentucky* (1986), 704 S.W. 2d 209, where Leibson J. emphasized the voidability of a gestational mother's preconception promise to give up a child, despite holding that the existence of commercial gestational service brokerage agencies did not violate state prohibitions against the purchase of children for adoption.
- 231. Trebilcock and Keshvani, *supra*, note 199, 581. See M. Seidman, "Baby M and the Problem of Unstable Preferences," Georgetown Law Journal 76 (1988), 1933, where he suggests that if we are serious about controlling third party effects, "surrogate" parenting may not be an appropriate place to start. Taken to its logical conclusion, this regulatory approach may well mandate the establishment of administrative agencies to oversee childbearing and childrearing questions generally; see also J. Areen, "Baby M Reconsidered," Georgetown Law Journal 76 (1988), 1758, where she suggests that because a child conceived through a gestational service arrangement is produced precisely for the purpose of being

adopted, this may create a set of relationships fraught with peril — specifically the child may view himself or herself as a commodity.

- 232. When speaking of babies born as the result of collaborative reproductive arrangements, John Robertson writes: "Even if their life is somehow more fraught with psychological difficulties and suffering than the life of the ordinary child, it is the only life possible for them. Prohibiting collaborative transactions thus does not protect the child, for without them the child would never come into being at all. Psychosocial confusion, even genetic bewilderment, is an acceptable price for the offspring to pay in order to exist." See Robertson, "Procreative Liberty, Embryos," supra, note 46, 186.
- 233. See Gostin, *supra*, note 208, 9-10. Gostin argues that we do not restrict births in other situations where family life may be even more complicated.
- 234. Other individuals whose autonomy could potentially be decreased by a gestational service contract include all those in the family of the gestational mother, particularly her children, who may themselves feel a loss when she gives up the baby she has gestated, whether or not she gives it up willingly. Children of the commissioning individuals may also be harmed, witnessing what they may interpret to be the "purchase" of a sibling. Although these negative impacts on autonomy may be very real, they are arguably insufficient to override the autonomy increases that are possible from gestational service exchange.
- 235. See Cunningham, *supra*, note 197, 745. Walter M. Weber has cautioned furthermore that we do not know the effects on a fetus of being in the womb of a mother who is consciously trying to distance herself from it. See W.M. Weber, "The Personhood of Unborn Children: A First Principle in 'Surrogate Motherhood' Analysis," *Harvard Journal of Law & Public Policy* 13 (1990): 150-57.
- 236. Note that this latter concern is really one about the need to have enforceable legislation dictating the terms of gestational service agreements, rather than about what the terms of this legislation ought to be. The danger of a child being at the centre of a high-profile custody battle could be avoided by legislation determining, before the child's birth, who it is that ought to take custody in the event of a disagreement, be it the birth mother or the commissioning individuals.
- 237. This is the conclusion drawn by Trebilcock and Keshvani, *supra*, note 199, 581. Gostin, *supra*, note 208, 11, suggests that the law "can require all that is necessary to ensure full information and the fitness of the parties to enter into the surrogacy arrangement." See also Andrews, "Policy and Procreation," *supra*, note 206.
- 238. The recommendations of the Ontario Law Reform Commission, *supra*, note 105, provide an example of this approach.
- 239. With all the attendent conceptual difficulties this conclusion brings, illustrated above. For this argument in a Pareto-efficiency context, see Posner, "Ethics and Economics," *supra*, note 133, 23. In *Sex and Reason*, *supra*, note 133, Posner writes that: "Most people derive a net positive utility from living."
- 240. Note that, as above, there may be particular situations where it is more harmful than not for the child to be taken from its mother. See R.A. Posner, "The Regulation of the Market in Adoptions," *Boston University Law Review* 67 (1987). Posner writes: "Refusing to grant specific performance in circumstances in which it appears that forcing the sale to go through would harm the baby is consistent

with the basic equity principle that the third-party effects of equitable remedies must be considered in deciding whether to grant such a remedy or confine the plaintiff to damage remedies. The child is an interested third party whose welfare would be disserved by a mechanical application of the remedies available to buyers in the market for inanimate goods" (ibid., 67).

- 241. Note that the market exchange of a woman's gestational service, with the high prices that could result, might well leave poorer couples "worse off" in comparison to an alternate allotment scheme in which prices were low enough to allow their access. See Posner, Sex and Reason, supra, note 133, 428.
- 242. See Bayles, *supra*, note 142. See also R.J. Arneson, "Commodification and Commercial Surrogacy," *Philosophy & Public Affairs* 21 (1992), 132; A. Wertheimer, "Two Questions About Surrogacy and Exploitation," *Philosophy & Public Affairs* 21 (1992): 211-39.
- 243. Posner, "Ethics and Economics," supra, note 133, 22.
- 244. Sorkow J. wrote in his trial judgment on *Baby M*, 525 A. 2d. 1128 (1987), 1159, that: "To wait for birth, to plan, pray and dream of the joy it will bring and then be told that the child will not come home, that a new set of rules applies and to ask a court to approve such a result deeply offends the conscience of this court. A person who has promised is entitled to rely on the concomitant promise of the other promisor." Bernard Dickens has suggested that without a freely established and fully enforceable contract price, a gestational mother would be free to commit extortion after the birth, holding the baby ransom for an increased price. See B.M. Dickens, "Enforcement of Surrogate Motherhood Agreements," *Transplantation/Implantation Today* 4 (May 1987), 22. Posner makes the same point in *Sex and Reason*, supra, note 133, 422.
- 245. For an extensive examination of the difficulties associated with providing damage remedies in this context, see Cunningham, supra, note 197, 745ff.
- 246. This was the solution proposed by Sorkow J. in the Baby M trial.
- 247. R. Macklin, "Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis," Law, Medicine and Health Care, 16 (1988), 60.
- 248. Posner, *Sex and Reason*, *supra*, note 133, 426. In contrast to this argument, Joan Mahoney offers the following:

Imagine, for example, that a famous doctor advertised for male volunteers to be subjects in her study (a study she was sure would win her the Nobel Prize). The men were to stay in bed for several months eating only the foods prescribed by the doctor, after which she was to perform open-heart surgery. If a man signed up for the study, stayed in bed, ate the foods, and then, at the last minute, announced that he could not possibly have the surgery, no court in the country would order him to go through with it, contract or no contract.

- See J. Mahoney, "An Essay on Surrogacy and Feminist Thought," Law, Medicine and Health Care, 16 (1988), 83.
- 249. Andrews, "Control and Compensation," supra, note 47, 554. In contrast to Andrews' argument, see Cunningham, supra, note 197, 743-45. Cunningham argues that the gestational service contract is not a personal service contract like any other.

- 250. Posner, "Ethics and Economics," supra, note 133, 23. Note that this logic does not necessarily prohibit the conclusion that birth mothers should not be forced to give up their children. On page 25, Posner writes that "the tendency in economics to evaluate welfare on an ex ante rather than ex post basis depends on an assumption that expectations are not systematically biased." Therefore, a gestational service contract may not result in welfare gains if a woman underestimated at the outset the distress she would suffer when she gave up the baby.
- 251. On the subject of an adoption market, see Landes and Posner, *supra*, note 142; Posner, *supra*, note 240; and J.R.S. Prichard, "A Market for Babies?" *University of Toronto Law Journal* 34 (1984): 341-57.
- 252. Posner, "Ethics and Economics," *supra*, note 133, 22. Posner adds that he believes the demand for gestational service arrangements would still exist even if there was a free market in adoption, however, since individuals would still want to commission the birth of children genetically related to them.
- 253. Posner, Sex and Reason, supra, note 133, 422. Wilentz C.J. supported this analysis in the Baby M appeal (1988), supra, note 179, 1249: "The demand for children is great and the supply small ... The situation is ripe for the entry of the middleman who will bring some equilibrium into the market by increasing the supply through the use of money."
- 254. Prichard, supra, note 251, 345. In fact, Prichard does not advocate such a market.
- 255. Ibid., 343. Prichard suggests that, at present, there is no incentive for women to give up newborns because they are not remunerated for doing so. There is also no reward provided for a well-cared-for child (i.e., produced after a smoke- and drink-free pregnancy), so women have no incentive to care properly for the fetus as it develops.
- 256. Ibid., 346.
- 257. Selick, supra, note 192.
- 258. Posner, Sex and Reason, supra, note 133.
- 259. Ibid. In practice, wealthy individuals are able to buy their way to the beginning of adoption line-ups, Posner argues. If anything, a market in gestational service contracts would *improve* the prospects of infertile individuals with modest means. In contrast, see Blank, *supra*, note 28, 75.
- 260. Schuck, supra, note 202, 136.
- 261. R. Macklin, "Ethics and Human Values in Family Planning: Perspectives of Different Cultural and Religious Settings," in Ethics and Human Values in Family Planning, ed. Z. Bankowski, J. Barzelatto, and A.M. Capron, Council for International Organizations of Medical Sciences, 22nd Conference, 1988, Bangkok, Thailand (Geneva: CIOMS, 1989), 71. For another attempt at a utilitarian evaluation of gestational service contracts, see C.E. Schneider, "Surrogate Motherhood from the Perspective of Family Law," Harvard Journal of Law & Public Policy 13 (1990): 125-31.
- 262. Macklin, ibid., 71.
- 263. Schneider, supra, note 261.

- 264. On this last point see Shannon, *supra*, note 140, 161. Shannon asks whether the significant expenditure associated with this technology can be justified when it currently benefits so few members of the population.
- 265. Macklin, *supra*, note 247, 58, writes that "reasonable people frequently disagree over what should count as good and bad consequences, and how much weight should be assigned to each."
- 266. Schneider, supra, note 261, 126.
- 267. Schuck, supra, note 202, 136.
- 268. Ibid.
- 269. Schuck's response to the critics of gestational service contracts is to increase the amount of information provided to all parties involved. Ibid., 137.
- 270. Overall, supra, note 98, 50. Overall herself is strongly against gestational service agreements.
- 271. Mack, supra, note 90, 217.
- 272. Rothenberg, supra, note 185, 348.
- 273. Ibid., 349.
- 274. This is, in fact, a procedure that women can even perform on themselves. However, when women inseminate themselves, fresh sperm is usually used. Fresh sperm may not have been tested for sexually transmitted diseases, including AIDS, and it may therefore be dangerous to the woman.
- 275. For this interpretation of distributive justice theory, see Macklin, supra, note 247, 63.
- 276. Radin, supra, note 2, 1930.
- 277. In the Baby M appeal, (1988), supra, note 179, Wilentz C.J., 1249, the court said it this way: "... it is noted that the Sterns are not rich and the Whiteheads not poor. Nevertheless, it is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent."
- 278. S. Sherwin, "Feminist Ethics and New Reproductive Technologies," in *The Future of Human Reproduction*, ed. C. Overall (Toronto: Women's Press, 1989), 266. Elsewhere Sherwin has argued that gestational service agreements in practice amount to the exploitation of poor, under-educated, and emotionally unstable women. See Sherwin, "Feminist Ethics and In Vitro Fertilization," in *Science, Morality & Feminist Theory*, ed. M. Hanen and K. Nielsen (Calgary: University of Calgary Press, 1987), 299.
- 279. Commercial agencies in the United States often charge commissioning individuals upwards of \$40 000, \$10 000 of which goes to the birth mother. See Blank, *supra*, note 28, 75.
- 280. Posner, Sex and Reason, supra, note 133.
- 281. Posner asks why society does not forbid all the other contracts for luxury goods that involve the rich purchasing from the poor. See Posner, "Ethics," *supra*, note 133, 26.
- 282. Ibid., 25. Bayles, supra, note 142, makes the same argument.

- 283. Alan B. Rassaby puts this more harshly: "Given a choice between poverty and exploitation, many people may prefer the latter." See Rassaby, "Surrogate Motherhood: The Position and Problems of Substitutes," in *Test-Tube Babies: A Guide to Moral Questions, Present Techniques and Future Possibilities*, ed. W.A.W. Walters and P. Singer (Melbourne: Oxford University Press, 1982), 103.
- 284. Radin, supra, note 2, 1930.
- 285. See Andrews, "Policy and Procreation," *supra*, note 206. Bayles, *supra*, note 142, 26, writes: "In general, one should not accept limitations on otherwise permissible activities because poor people cannot afford them, but should try to raise the income of the poor or subsidize the activities so that poor people can afford them."
- 286. By "exploitation" in this context we mean a situation where the gestational mother, because of her impoverished circumstances (financial or emotional), is subjected to the demands of another, stronger party. The gestational service arrangement may be an unequal one, where commissioning individuals use their greater power to force a birth mother to undergo certain processes, or face certain restrictions, that she herself otherwise might not have chosen. For an extensive analysis of the use of the word "exploitation" in this context, see Wertheimer, *supra*, note 242.
- 287. See Macklin, supra, note 261, 81. See also Corea, supra, note 75.
- 288. Corea, ibid., esp. chap. 11, "Surrogate Motherhood: Happy Breeder Woman."
- 289. G. Corea, "Human Slavery," in *Hi-Tech Babtes Alternative Reproductive Technologies*, ed. G.E. McCuen (Hudson: Gary E. McCuen Publications, 1990), 101. See also *Infertility: Women Speak Out* (London: Pandora, 1989).
- 290. Sherwin makes this argument regarding reproductive technologies in general, in "Feminist Ethics," supra, note 278, 263. Deborah C. Poff makes the same argument, in the context of DI and IVF. See Poff, supra, note 156, 222.
- 291. An argument would also have to be made distinguishing the provision of gestational services from the wide variety of other goods and services that are not subsidized. Allusion would likely have to be drawn to our subsidized health care system, though defining infertility as an "illness" to be treated by the state is problematic, as we saw in Part 2.
- 292. Chavkin et al., supra, note 184, 408. Indeed, these feminists argue that the gestational mother should have the right to give the child up for adoption after its birth thus further increasing her own control over the situation.
- 293. This recommendation was the one adopted by the Glover Report, *supra*, note 19.
- 294. It is important to note that the writings of some theorists particularly feminists within the "essentialist" category could also be grouped within the contingency feminist category. That is to say, some writers offer arguments from both perspectives to make their case with regard to gestational service agreements. Accordingly, the mention of a writer within the "essentialist" category does not necessarily imply that the writer's views are confined to the essentialist perspective. The same argument is also true of some writers within the "distributive justice" category.

- 295. For an overview of potential conflicts with the traditional conception of the family, see, for example, Field, *supra*, note 218, 33-45.
- 296. See Congregation for the Doctrine of the Faith, *supra*, note 6, 39. Gestational service arrangements, according to the *Instruction*, are "contrary to the unity of marriage and to the dignity of the procreation of the human person" (p. 25).
- 297. John W. Carlson has suggested that some forms of reproductive technology, such as GIFT for example, where conception takes place in a woman's body, might be found to be in keeping with Roman Catholic principles. See Carlson, "Donum Vitae on Homologous Interventions: Is IVF-ET a Less Acceptable Gift than 'GIFT'?" Journal of Medicine and Philosophy 14 (1989), 529.
- 298. Weber, *supra*, note 235, 151. Weber's submission is part of a brief prepared for a case on behalf of a Catholic organization. The argument is that "the subject of a surrogacy contract is a person who is entitled to respect as a member of the human race." In the *Baby M* appeal, Wilentz C.J. acknowledged these religious and natural law concerns when he wrote: "There are, in a civilized society, some things that money cannot buy ... There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life." *Baby M* (1988), *supra*, note 179, 1249.
- 299. In response to the concern that babies should not come into the world as a result of market transactions, Lori Andrews writes that babies "should probably not come into the world in an attempt to hold a marriage together, to provide love for a woman who feels unloved, to provide a son for a man who has a family of daughters, and so forth." See Andrews, "Alternative Modes of Reproduction," supra, note 47, 373, fn 54, and Andrews, "Policy and Procreation," supra, note 206.
- 300. L.S. Cahill, "The Ethics of Surrogate Motherhood: Biology, Freedom and Moral Obligation," *Law, Medicine and Health Care* 16 (1988), 69. Feminist Maura Ryan, *supra*, note 73, 10, writes in this same vein when she refers to the "involuntary nature of kinship."
- 301. Cahill, ibid., 71.
- 302. Indeed many feminists have strongly objected to being linked in any way to conservative or religious critics of the new reproductive technologies. On this see Raymond, *supra*, note 74, 58.
- 303. As we have seen, the typical gestational service arrangement so far practised has been that exemplified in the  $Baby\ M$  case, where the genetic father provided the sperm to inseminate the birth mother. These arrangements have been the major subject of feminist critique, given that the birth mother performs a reproductive service from which the commissioning father has the most to gain, emphasizing the exploitation of women by men. Indeed many claim that the genetic father's wife is as manipulated in the gestational service agreement as is the birth mother.
- 304. In this fashion gestational service agreements are compared to prostitution. For a description of this comparison, see Overall, *supra*, note 98, esp. chap. 6. Many feminists have pointed out that any fulfilment in the gestational service context of commissioning individuals' "procreative autonomy," in the manner suggested by Robertson, "Procreative Liberty, Embryos," *supra*, note 46, must use another individual as a means to that end. See, for example, Anderson, *supra*, note 190, 90. Janice Raymond argues that "many feminists locate the NRTs squarely within the context of violence against women." See Raymond, *supra*, note 74, 60.

- 305. Shannon, supra, note 216, esp. chap. 4.
- 306. Morgan, supra, note 73, 74.
- 307. There has been an "annihilation of anything recognizable as an integrated, human, woman-focused experience of conception and maternity." Ibid., 65. Janice Raymond argues further: "The fragmentation of motherhood into discrete parts can only augment the ways in which women are personally and politically divided from each other under patriarchy." See Raymond, *supra*, note 74, 62.
- 308. "It is men who remove eggs; men who fertilize eggs; men who transplant embryos; and men who are the primary recipients of the harvest in the context of 'surrogate' motherhood." Morgan, supra, note 73, 65. Woman has literally become, in the words of Gena Corea, "the mother machine." See Corea, supra, note 75. Debra Satz has recently argued that only an understanding of women's systemic and pervasive disadvantage in society can provide an adequate understanding of the exploitative character of gestational service arrangements. Markets in women's reproductive labour are especially detrimental because they reinforce gender hierarchies and inequalities in a manner that other labour markets do not. See Satz, supra, note 89.
- 309. Katharine T. Bartlett argues that current legal approaches to child custody disputes are "grounded in notions of exchange and individual rights, and implicitly encourag[e] parental possessiveness and self-centeredness," whereas laws governing the parent-child relationship ought to be based on "notions of benevolence and responsibility ... to reinforce parental dispositions toward generosity and other-directedness." Bartlett, "Re-Expressing Parenthood," *Yale Law Journal* 98 (1988), 294.
- 310. Ryan, supra, note 73, 9, 10.
- 311. Carole Pateman writes: "The political implications of the surrogacy contract can only be appreciated when surrogacy is seen as another provision in the sexual contract, as a new form of access to and use of women's bodies by men." See Pateman, *supra*, note 6, 209-10.
- 312. Andrea Dworkin has written that "the only time that freedom is considered important to women as such is when we're talking about the freedom to prostitute oneself in one way or another." Dworkin, *Right-Wing Women* (New York: Perigee Books, 1983), 227.
- 313. Barbara Katz Rothman has written extensively about the societal structuring of women's "choices." See, for example, "The Meanings of Choice in Reproductive Technology," in *Test-Tube Women*, ed. R. Arditti, R.D. Klein, and S. Minden (Boston: Pandora Press, 1984), 23. On this topic see also J. Hanmer, "A Womb of One's Own," in *Test-Tube Women*, ed. R. Arditti, R.D. Klein, and S. Minden (Boston: Pandora Press, 1984), 438.
- 314. S. Brodribb, "Delivering Babies: Contracts and Contradictions," in *The Future of Human Reproduction*, ed. C. Overall (Toronto: Women's Press, 1989), 144.
- 315. Indeed, use of the term "service" in this context is highly questionable for many feminists. "The claim that the payment to the 'surrogate' is merely for 'gestational services' is plainly just a pretence, since payment is made 'upon surrender of custody' of the child and for 'carrying out ... obligations' under the agreement." See Capron and Radin, *supra*, note 14, 37.

- 316. Brodribb, supra, note 314, 156.
- 317. Anderson, supra, note 190, 77. Gostin, supra, note 208, 14, has pointed out that this argument need not be gender-based.
- 318. See Field, supra, note 218, 26-29. Also Shannon, supra, note 216, 151-52.
- 319. Capron and Radin, supra, note 14, 36.
- 320. Ibid., 39.
- 321. B.K. Rothman, "Reproductive Technology and the Commodification of Life," Women & Health 13 (1987), 99. See also R.A. Charo, "Problems in Commercialized Surrogate Mothering," Women & Health 13 (1987), 200. More generally, see Rothman, supra, note 57.
- 322. Titmuss, supra, note 94.
- 323. The Glover Report, supra, note 19, 84-85.
- 324. Chavkin et al., supra, note 184, 407.
- 325. See, for example, Ryan, supra, note 73.
- 326. Anderson, supra, note 190, adopts a similar line of reasoning.
- 327. On this point see Field, supra, note 218, 22.
- 328. See Radin, supra, note 2. Also Charo, supra, note 321, 200, who argues that: "Surrogate mothering can never be effectively outlawed, as long as women are willing to undergo at-home artificial insemination or even plain, old-fashioned sexual relations, in order to bear a child for a friend who cannot." Most feminists who tolerate these private agreements would still require that birth mothers have the opportunity to renounce the transfer at the time of the child's birth.
- 329. "Feminists are not reassured that this altruism can be accepted as constituting a truly voluntary choice, since self-sacrifice, especially in terms of childbearing for others, seems to be a paradigm example of the ways in which feminine socialization may be connected with women's roles in an oppressive society." See Sherwin, "Feminist Ethics," supra, note 278, 266. In particular on this subject see Raymond, supra, note 91.
- 330. Of course, the problem with this position is the difficulty of its enforcement.
- 331. One problem with a complete prohibition of this activity is the potential proliferation of a black market in gestational service agreements, where birth mothers would be deprived of any legal protection at all.
- 332. Congregation for the Doctrine of the Faith, supra, note 6.
- 333. See, for example, Capron and Radin, *supra*, note 14, 37; Chavkin et al., *supra*, note 184, 406; and Allen, *supra*, note 196, 147.
- 334. Mahowald, supra, note 32, 749.
- 335. Dickens, supra, note 31.
- 336. Mahowald, supra, note 32, 750.
- 337. N.P. Terry, "Politics and Privacy: Refining the Ethical and Legal Issues in Fetal Tissue Transplantation," Washington University Law Quarterly 66 (1988), 525.
- 338. See, for example, Burlingame, supra, note 36, 239, n. 202.

- 339. See, for example, M.W. Danis, "Fetal Tissue Transplants: Restricting Recipient Designation," *Hastings Law Journal* 39 (1988), 1106; J.S. Bregman, "Conceiving to Abort and Donate Fetal Tissue: New Ethical Strains in the Transplantation Field A Survey of Existing Law and a Proposal for Change," *UCLA Law Review* 36 (1989), 1187; and J.M. Hillebrecht, "Regulating the Clinical Uses of Fetal Tissue," *Journal of Legal Medicine* 10 (1989), 285: "If fetal-cell implants meet only half of researchers' expectations, the demand for fetal tissue could make the present organ-transplant industry seem picayune, and demand could outpace supply."
- 340. D. Jones, "Halifax Hospital First in Canada to Proceed with Controversial Fetal-Tissue Transplant," Canadian Medical Association Journal 146 (1992): 389.
- 341. Ibid., 390.
- 342. G.L. Morgan, "Is There a Right to Fetal Tissue Transplantation?" University of Tasmania Law Review 10 (1991), 129.
- 343. Ibid., 138-40.
- 344. Ibid., 138.
- 345. Ibid.
- 346. Ibid., 139.
- 347. Ibid., 140.
- 348. Robertson, supra, note 35, 491.
- 349. Ibid., 491.
- 350. These organizations process the fetal tissue to reduce the chance of rejection by the recipient's immune system.
- 351. Terry, supra, note 337, 530-31.
- 352. Fine, supra, note 34, 7.
- 353. Robertson, *supra*, note 35, 467. Note that with respect to abortions of pregnancies that were not intentionally conceived for tissue procurement purposes, "aborting will probably be less physically hazardous and intrusive than going to term, even though grief and psychological complexities doubtlessly may occur." Ibid.
- 354. Morgan, supra, note 342, 142.
- $355. \$  Ibid. Morgan suggests that a hospital ethics committee monitor the procedure for obtaining the informed consent of the patient.
- 356. Ibid., 144, 149.
- 357. Ibid., 150.
- 358. J.F. Sedlak, "Fetal Tissue Transplantation: Regulating the Medical Hope for the Future," Journal of Law and Health 4 (1989), 80.
- 359. With respect to the issue of consent, one argument that is often and forcefully made is the inadequacy of the woman's consent to donation of the fetal tissue obtained from her elective abortion. Many commentators argue that the woman's consent to fetal tissue donation or sale is morally irrelevant as she has abdicated her role as a proxy for the fetus by her decision to terminate her pregnancy to further her own autonomy. See, for example, J.T. Burtchaell, "University Policy on Experimental Use of Aborted Fetal Tissue," *IRB: A Review of Human Subjects*

Research 10 (July-August 1988), 8. A useful encapsulation of the argument is made by A.R. Jonsen:

The critics say that the woman who decides to abort does not have the moral right to donate the abortus for therapy or for research because she is the cause of its death; she cannot be making a decision in the interest of, or for the wellbeing of, the fetus and thus loses the right to donate it. Thus, while use of cadaver tissue is morally acceptable, use of abortus tissue is not; the morally relevant difference lies in a defect of consent ...

The objection would be fatal or damaging [to the practice of transplanting cadaver fetal tissue obtained by induced abortion] if consent were intrinsically necessary for the moral acceptability of using cadaver tissue ...

In general, consent is ethically important because it manifests and protects the moral autonomy of persons. It allows them to govern their lives in terms of their own values. Also, it is a barrier to exploitation and harm. These purposes are no longer relevant to the cadaver which has no autonomy and cannot be harmed.

A.R. Jonsen, "Transplantation of Fetal Tissue: An Ethicist's Viewpoint," *Clinical Research* 36 (1988), 218-19.

- 360. Bregman, supra, note 339, 1189.
- 361. Burlingame, supra, note 36, 236.
- 362. B. Lafave, "Who's in Control? Eggs, Embryos and Fetal Tissue," *Healthsharing* 9 (September 1988), 30.
- 363. Further, the latter class of women are unlikely to view fetal tissue donation as a primary factor in their decision to abort or to carry the fetus to term.
- 364. Danis, supra, note 339, 1104.
- 365. Burlingame, supra, note 36, 239, n. 202.
- 366. Bregman, supra, note 339, 1189, citing T.H. Murray, "Gifts of the Body and the Needs of Strangers," Hastings Center Report 17 (April 1987): 32.
- 367. "For example, fetal pancreatic and liver cells can evoke an immune response." Morgan, supra, note 342. Thus transplants of fetal islet cells into the pancreases of diabetics might require some degree of histocompatibility.
- 368. Mahowald, supra, note 32, 753.
- 369. Ibid.
- 370. Bregman, supra, note 339.
- 371. Radin, supra, note 2, 1910.
- 372. J.F. Childress, "Ethics, Public Policy, and Human Fetal Tissue Transplantation Research," Kennedy Institute of Ethics Journal 1 (1991), 114.
- 373. Ibid. One example might be a test for HIV antibodies.
- 374. Ibid.
- 375. Mahowald et al., supra, note 30, 13.
- 376. U.K., House of Commons, "Review of the Guidance on the Research Use of Fetuses and Fetal Material," Cm 762 in Sessional Papers (1989) 4.3. Fine makes

a similar argument: "The pregnant woman should not be asked to accept greater risk just to increase the chance of successful transplantation: the termination of her pregnancy ought, as a matter of course, to be performed by the safest available method. Medical decisions regarding abortion should be made without regard to potential subsequent use of fetal tissue. Physicians involved in any such use must remain distinct from those involved in the abortion." Fine, supra, note 34, 7.

377. T.M. Hess-Mahan, "Human Fetal Tissue Transplantation Research: Entering A Brave New World," Suffolk University Law Review 23 (1989), 822.

378. Terry, supra, note 337, 524. An example of a middle position is found in the Polkinghorne Committee Report, which described a "special status for the living human fetus at every stage of its development which we wish to characterise as a profound respect based upon its potential for development into a fully-formed human being," United Kingdom, supra, note 376, 2.4. This status was considered to be "broadly comparable to that of a living person." Ibid., 3.1.

379. R. Wasserstrom, "Ethical Issues Involved in Experimentation on the Nonviable Human Fetus," in United States, National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *Research on the Fetus: Appendix* (Washington, DC: Department of Health, Education, and Welfare, 1975), 9-3.

380. J. Robertson, "Concurring Statement," in United States Human Fetal Tissue Transplantation Research Panel, *Report* (Bethesda: National Institutes of Health, 1988), Vol. I, 31. See also G.J. Annas and S. Ellis, "The Politics of Transplantation of Human Fetal Tissue," *New England Journal of Medicine* 320 (1989), 1080: "the fetus lacks the status of a child and, after death, has no protectable interests of its own."

381. S. Bok, "Fetal Research and the Value of Life," in United States, National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Research on the Fetus: Appendix (Washington, DC: Department of Health, Education, and Welfare, 1975), 2-7.

382. See Dickens, *supra*, note 31, 33; Fine, *supra*, note 34, 6. This argument suggests that fetal organ transplants may be more problematic from the perspective of the harm to the fetus, as organs are required to be more developed than the tissue currently used for transplants.

383. Robertson, supra, note 35, 458, n. 50.

384. United Kingdom, supra, note 376, 3.1.

385. The prolonging of pregnancy for the purpose of obtaining more useable fetal tissue discussed above may also impose additional harm on the fetus. From an ethical perspective, the analogy between the prolonging of pregnancy to retrieve more useable fetal tissue and the maintenance of the vital functions of a cadaver donor has been somewhat contentious. Mahowald et al. argue that the comparison is apposite. *Supra*, note 30, 10. In contrast, Fine states that the two actions are distinguishable given the fact that the fetus continues to develop while the pregnancy is prolonged, and may develop to a stage where it is sensitive to pain stimuli. *Supra*, note 34, 7.

386. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983), referring to Roe v. Wade, 410 U.S. 113, 163 (1973).

- 387. See, for example, C.A. Sheehan, "Fetal Tissue Implants: An Explosive Technology Needs National Action," Dickinson Law Review 92 (1988), 915.
- 388. "The fetus is not a person in any *legal* sense, 'but *common* sense and common dignity elevate it above the status of a gallbladder. The potential of a gallbladder is to become an older gallbladder, whereas the fetus has the potential to become a person.' Even after it has ended, in other words, the fetus's potential entitles it to be treated with some measure of respect and dignity. Barring its use as a vehicle for profit does not seem 'too respectful' of the fetus." Hillebrecht, *supra*, note 339, 305, citing D.G. Nathan, "Fetal Research: An Investigator's View," *Villanova Law Review* 22 (1977), 390.
- 389. Terry, supra, note 337, 525.
- 390. M.B. Mahowald, "Placing Wedges Along a Slippery Slope: Use of Fetal Neural Tissue for Transplantation," *Clinical Research* 36 (1988), 221.
- 391. M.J. Walker, "Fetal Tissue Harvesting: Should Courts Be the Final Arbiter?" Gonzaga Law Review 23 (1987/88), 623.
- 392. Robertson, *supra*, note 35, 461. Robertson does acknowledge the greater moral significance of the decision to create and abort. This is, however, a separate issue from the harm to the fetus, as it focusses on the harm to society caused by intentional pregnancies for fetal tissue procurement. Harm to society is considered *tnfra* in the context of essentialist theories. Robertson's caveat with regard to the timing of the abortion is further explained in a footnote: "The situation is thus distinguishable from one in which the entity created did develop interests before being sacrificed for the good of others." Ibid., 461, n. 57. The determination of when such interests develop is therefore central to the strength of Robertson's assertion that the intentionally created fetus does not suffer greater harm than the fetus in the unplanned pregnancy context. As already noted, Robertson advocates the use of the viability threshold as the point at which fetal interests develop.
- 393. Recall that we are operating in this part under the assumption that fetal tissue is a scarce resource.
- 394. A.L. Caplan, "Blood, Sweat, Tears, and Profits: The Ethics of the Sale and Use of Patient Derived Materials in Biomedicine," *Clinical Research* 33 (1985), 449-50. See also Titmuss, *supra*, note 94.
- 395. Sedlak, supra, note 358, 75.
- 396. As we saw in the context of the sale of gametes and pre-embryos, however, it is difficult to place a value on the physical risks associated with the production of fetal tissue *de novo*.
- 397. Walker, supra, note 391, 628.
- 398. Ibid.
- 399. This contention will be discussed in detail below in the context of essentialist theories.
- 400. Sedlak, *supra*, note 358, 75. Theodore Hess-Mahan writes that "the possibility of the purchase and sale of fetal tissue from both foreign and domestic sources raises an ugly specter of unrestrained exploitation of third world, impoverished women for the benefit of mostly affluent Americans." Hess-Mahan, *supra*, note 377, 822.

- 401. Lafave, *supra*, note 362, 31. See also, for example, Hillebrecht, *supra*, note 339, 290: "if ... scarcity became acute, competitive pressures and the prospect of great economic rewards would make the worst kinds of exploitation likely. If the price becomes high enough, the specter of 'fetus farms' the organized encouragement of intentional pregnancies designed to supply fetal tissue of the right age and in the right condition in exchange for cash becomes a real possibility. A greater 'desacralization of the life process,' and a greater exploitation of poor women, is hard to envision." See also Sheehan, *supra*, note 387, 914 ("Because they are biologically able to reproduce, women could potentially become part of a commodity market, particularly in third world nations"); Sedlak, *supra*, note 358, 74 ("Poor or desperate women might be pressured into conceiving and aborting to pay bills, support drug habits, or simply for greed").
- 402. Mahowald, supra, note 32, 755.
- 403. Titmuss, supra, note 94.
- 404. E. Thorne, "Tissue Transplants: The Dilemma of the Body's Growing Value," *Public Interest* No. 98 (Winter 1990), 39.
- 405. Radin, supra, note 2, 1910-11.
- 406. Ibid., 1910, 1915-17. This is a very terse description of the double bind. For a more in-depth analysis, including the problem of the dilemma of transition, see ibid., 1915-17.
- 407. Ibid., 1911.
- 408. Statement by Gena Corea cited in C. Gorman, "A Balancing Act of Life and Death," *Time* (1 February 1988): 109.
- 409. The difficulty associated with setting the amount of such a payment is apparent, and is discussed further in the context of the appropriate regulatory framework for fetal tissue procurement.
- 410. Caplan, supra, note 394, 449.
- 411. Sedlak, *supra*, note 358, 75. Theodore Hess-Mahan notes that "the anticipated demand by patients and their relative abilities to pay could conspire to place some designated recipients ahead of other, more [medically] appropriate patients on the waiting list, perhaps decreasing the prospects of successful transplantation for each." *Supra*, note 377, 822-23.
- 412. W. Kearney, D.E. Vawter, and K.G. Gervais, "Fetal Tissue Research and the Misread Compromise," *Hastings Center Report* 21 (September-October 1991), 11.
- 413. See Congregation for the Doctrine of the Faith, supra, note 6.
- 414. See Childress, *supra*, note 372, 97. Childress states that such justification is based on the rule of double effect in Catholic teachings, and on the primacy of maternal health in Judaism. Ibid.
- 415. United States, Human Fetal Tissue Transplantation Research Panel, *Report* (Bethesda: National Institutes of Health, 1988), Vol. II, E42.
- 416. Walker, supra, note 391, 629.
- 417. Ibid.

- 418. Terry, *supra*, note 337, 531. Terry suggests that many of the ethical concerns voiced over fetal tissue are really abortion-related concerns and are directed at decreasing the number of abortions. Ibid.
- 419. Jonsen, supra, note 359, 218.
- 420. Ibid.
- 421. Mahowald, supra, note 32, 750.
- 422. Robertson, supra, note 35, 449.
- 423. Ibid.
- 424. Ibid., 449-50.
- 425. Burtchaell, supra, note 359, 9.
- 426. Ibid.
- 427. Ibid.
- 428. B. Freedman, "The Ethics of Using Human Fetal Tissue," *IRB: A Review of Human Subjects Research* 10 (November-December)(1988), 3.
- 429. Burtchaell, supra, note 359, 9-10.
- 430. Freedman, supra, note 428, 4.
- 431. Ibid.
- 432. J.A. Robertson, "Fetal Tissue Transplant Research Is Ethical," *IRB: A Review of Human Subjects Research* 10 (November-December 1988), 7.
- 433. J.T. Burtchaell, "The Use of Aborted Fetal Tissue in Research: A Rebuttal," IRB: A Review of Human Subjects Research 11 (March-April 1989), 10.
- 434. D. Jones, "Woman Gets Transplant of Tissue from Aborted Fetuses," *Globe and Mall* (17 December 1991): A1.
- 435. Burtchaell, supra, note 359, 9.
- 436. Recall that we have already conceded the force of the complicity, societal legitimation, and inducement to abort arguments in the case of intentional pregnancies for tissue procurement purposes. Therefore, we are dealing in this section solely with fetal tissue from abortions of unplanned pregnancies. The complicity argument, as already noted, does not depend on the existence of a causal link between fetal tissue transplants and the number of abortions or societal attitudes toward abortions. The argument that the possibility of donating fetal tissue for transplantation purposes will lead to abortions of unplanned pregnancies that would not otherwise have been aborted is dealt with in the third part of this section.
- 437. Childress, *supra*, note 372, 103.
- 438. Robertson, supra, note 35, 453.
- 439. Ibid., 454.
- 440. Burlingame, supra, note 36, 235.
- 441. Annas and Ellis, supra, note 380, 1081.
- 442. B. Freedman, "Fetal Tissue Transplantation: Politics, Not Policy," Canadian Medical Association Journal 141 (1989), 1231.

- 443. It must be noted that the development of a regulatory regime that would have the effect of prohibiting or discouraging such pregnancies is a difficult prospect. While a prohibition on recipient designation would avoid some of these pregnancies, it would have to be coupled with an outright ban on financial inducements to completely eliminate the incentive to become pregnant in order to abort to sell fetal tissue.
- 444. See, for example, Kearney, *supra*, note 412, 12: "The contention that women would systematically and in significant numbers undertake elective abortion primarily to donate fetal tissue, either in response to market demands for such tissue or out of a sense of altruism, is a claim requiring, if not proof, at least a display of an argument." But contrast Burlingame, *supra*, note 36, 235.
- 445. Childress, supra, note 372, 105.
- 446. To avoid a black market, it may be necessary to couple such a ban with a prohibition on the designation of the recipient of the tissue by the donor.
- 447. Human Fetal Tissue Transplantation Research Panel, supra, note 415, Vol. I, 3.
- 448. Childress, supra, note 372, 107.
- 449. J.D. Bleich, "Dissenting Statement, Fetal Tissue Research and Public Policy," in United States, Human Fetal Tissue Transplantation Research Panel, *Report* (Bethesda: National Institutes of Health, 1988), Vol. 1, 40.
- 450. H.T. Greely et al., "The Ethical Use of Human Fetal Tissue in Medicine: Special Report of the Stanford University Medical Center Committee on Ethics," *New England Journal of Medicine* 320 (1989), 1095.
- 451. Burlingame, supra, note 36, 236.
- 452. Childress, supra, note 372, 109.
- 453. A.R. Bauer, "Bioethical and Legal Issues in Fetal Organ and Tissue Transplantation," *Houston Law Review* 26 (1989), 1000; Hillebrecht, *supra*, note 339, 281.
- 454. See Childress, *supra*, note 372, 107-109, for an argument that the prospect of fetal tissue donation will not motivate abortions of unplanned pregnancies if certain procedural safeguards are implemented.
- 455. Mahowald, supra, note 32, 751.
- 456. See the analysis in the previous part, where the remoteness of this possibility is discussed.
- 457. Mahowald, supra, note 32, 751.
- 458. Ibid.
- 459. Ibid.
- 460. Childress, supra, note 372, 109.
- 461. See text accompanying note 391.
- 462. Burlingame, supra, note 36, 215.
- 463. Mahowald, supra, note 32, 755. See also C.M. Meechan, "Fetal Experimentation: Protocols, Propriety and Parameters," *Queen's Law Journal* 11 (1986), 186 (comparison of a mother's sale of fetal tissue to slavery).

464. P. Devlin, supra, note 80, 10.

465. Ibid., 24.

- 466. Bregman, *supra*, note 339, 1191. Bregman proceeds to assert that "[b]ecause of the newness of fetal tissue transplantation itself, little public debate has transpired. Materials available to the public have been informational rather than advocative and, at this stage, public opinion has not polarized to a point where a moral consensus may be discerned." Ibid.
- 467. For example, the Polkinghorne Committee concluded that "[t]he prior decision to carry out an abortion should be reached without consideration of the benefits of subsequent use. The generation or termination of pregnancy to produce material for research or therapy is unethical." United Kingdom, *supra*, note 376, 4.1. The moral basis for this argument is Kantian. The Committee argued that an intentional pregnancy for tissue donation purposes "would be an ethically unacceptable use of the fetus as an instrument (treating it as a 'thing')." Ibid., 4.2. A similar argument is found in Bregman, *supra*, note 339, 1201: "The true objection [to intentional pregnancies for donation purposes] ... is that the fetus is treated without regard. It is treated as a nonentity and a tool, instead of as a living being imbued with precious potential life. Although the fetus is not a person, we are uncomfortably aware that it is somehow a life, and therefore, irreverent treatment seems offensive and obscene."
- 468. Hillebrecht, *supra*, note 339, 306. Robertson states that "most commentators and advisory bodies that have considered fetal tissue transplants recommend that market transactions in abortions and fetal tissue be prohibited." Robertson, *supra*, note 35, 473. Bauer reaches a similar conclusion, *supra*, note 453, 1003.
- 469. Hillebrecht, ibid., 305.
- 470. Burlingame, *supra*, note 36, 215. This argument has also been specifically directed at commercial fetal tissue processing: "some of the resistance [to commercial aspects of fetal tissue processing] reflects a vague apprehension that, by making something possible, we may unwittingly make it necessary. By allowing commercial entities to make such dramatic cures widely available for a broad spectrum of illnesses, society may be unable later to impose limits on the technology. Such commercialization may engender an irrepressible struggle to live forever, resulting in a brutal society whose members regard the next generation as nothing more than a spare-parts market." Ibid., 240-41.
- 471. S. Gorovitz, "Progeny, Progress, and Primrose Paths," in *Moral Problems in Medicine*, 2d ed., ed. S. Gorovitz et al. (Englewood Cliffs: Prentice-Hall), 357. See also Mahowald et al., *supra*, note 30, 15: "The roadway travelled by those who make ethical decisions is unavoidably a slippery slope. To traverse it successfully requires placing wedges at the right places, in order to restrict or stop travel at those points where one is most likely to fall." This view is rejected by autonomy theorists: "Deontologists tend to be skeptical of the technological view because of its potential violation of principles of autonomy and respect for persons." Bauer, *supra*, note 453, 1000.
- 472. See Sandel, supra, note 83; Taylor, Malaise of Modernity, supra, note 85.
- 473. The evaluation of such evidence is beyond the scope of this paper. Here, we attempt solely to canvass the arguments made against fetal tissue transplantation within the framework of the endogeneity of preferences.

474. J. Raymond, "Of Eggs, Embryos and Altruism," Reproductive and Genetic Engineering 1 (1988), 283.

475. See, for example, Danis, *supra*, note 339, 1092; Hillebrecht, *supra*, note 339, 287. It must be noted that a similar statement could be made about organ donors or even blood or sperm donors. Robertson deals with this argument as follows:

Insofar as persons donate body parts, they may be viewed as mere tissue or organ producers, with their full reality as persons obliterated by their tissue-producing role. Indeed, women who bear children are always in danger of being viewed as child-breeders. Such views oversimplify the complex emotional reality of organ and tissue donation and of human reproduction. While perceptions of pregnancy and procreative capacity may eventually be affected, the danger that fetal tissue donors would be so narrowly viewed would not justify barring women from freely assuming that role to provide sick patients needed tissue for transplant.

Robertson, supra, note 35, 468.

476. Raymond, supra, note 474, 283.

477. Raymond, supra, note 91, 9.

478. Ibid., 11.

479. Titmuss, supra, note 94, 73.

480. Ibid.

481. Raymond, supra, note 91, 365, 7.

482. Ibid., 9.

483. Ibid., 8.

484. Ibid., 9.

485. Ibid., 10.

486. Theorists such as Richard Posner argue that it is distributively just to offer financial inducements to the disadvantaged because this increases their income. For a discussion of this argument, see below.

487. The Glover Report explicitly recognizes the uniqueness of gametes and the implications for suppliers. It reads, "Semen donation is not just like blood donation. By donating semen for these new techniques, a man is partly responsible for bringing a new person into the world. The potential donor needs time to consider his motives, and possible future regrets. Perhaps a donation made by a young unmarried man is something he will later find difficult to talk about to his wife and children." Glover, *supra*, note 19, 32.

488. See, e.g., Daly and Wilson, supra, note 71; Alexander, supra, note 71; Crawford et al., supra, note 71; Strahlendorf, supra, note 71.

489. In the words of R. Snowden and G.D. Mitchell, "The donor is *not* giving semen to help other people in the same way that many of us donate blood. Semen is being given for the purpose of *creating a new human being* whereas blood is given to assist those who are already in existence and who need help. The issues of personal and social responsibility surrounding the care of people who already exist are very different from those surrounding the planned creation of a new individual" (emphasis in the original). Snowden and Mitchell, *supra*, note 12, 71.

490. Adoption, foster parenting, and volunteering or working in child care are all options for those who wish to share their lives with children.

491. Sunstein, "Legal Interference," supra, note 6; Sunstein, "Preferences and Politics," supra, note 6.

492. See J. Elster, *Ulysses and the Strens* (Cambridge: Cambridge University Press, 1979).

493. Posner, "Ethics and Economics," supra, note 133, 26.

494. Ibid., 25-26.

495. It could be argued that, since such a large set of opportunities is not currently available to the poor, and since reforms are unlikely to take place in the immediate future, it would be preferable in the meantime to allow disadvantaged persons to increase their income by selling their reproductive materials and services, even if this entails the offering of financial inducements to suppliers. However, this argument discounts the personal and moral aspect of reproductive materials and services (as opposed to other "products" and services that have traditionally been subject to market transactions). Also, the increase in income that the poor could secure by selling their reproductive materials and services in an unconstrained market might well be slight, if competition in the market forces suppliers to compete down to (opportunity) cost, as some economists (including Posner) predict. Finally, as is argued below, the moderate increases in income that could be secured by the poor if they were permitted to sell their reproductive materials and services on an unconstrained market could be used as a justification for postponing structural modifications to society that would extend to the poor a part of the range of options available to wealthier persons.

496. This type of argument is discussed in Field, *supra*, note 218, 26; and Shalev, *supra*, note 48.

497. Another option would be to reimburse donors at a rate equivalent to a percentage of their opportunity costs, up to a certain maximum. However, if our purpose in compensating donors for their time is to enable altruism to be exercised, it is not clear why well off persons, who can already afford to be altruistic, ought to be paid. Also, paying suppliers on a sliding scale would require the state to justify paying wealthier persons more than the poor for the same activity. Some might argue that this perpetuates inequalities already present in society. To structure incentives that would attract individuals from all socioeconomic groups it would be necessary to set incentives in relation to suppliers' various opportunity costs. But for compensation for out-of-pocket expenses, for example, all suppliers could be paid at the same, non-inducing rate.

498. Generally speaking, homemakers should be paid (e.g., \$4 per hour) for their time, even though they do not lose wages by participating. However, homemakers lose time they would otherwise spend cleaning or cooking; they may need to stay up later, hire someone, or persuade a friend to do those chores in their stead. People on salary also ought to be paid (e.g., \$4 per hour) because they lose time they might otherwise have had as a day off, or may need to work late, hire someone, or persuade a friend to take over their tasks in their absence. For people on social assistance, benefits could be adjusted such that the hourly rate would not function as an inducement. However, many persons who receive social assistance are also homemakers and/or are looking for work and, in these cases, the hourly rate would

indeed be compensatory rather than inducing. Situations may arise whereby persons who are not on social assistance, are not homemakers, and also are not employed in the labour market present themselves to be donors, in which case the hourly rate could function as an inducement. Special arrangements would need to be made to accommodate these rare possibilities.

499. Medical Research Council of Canada, *Guidelines on Research Involving Human Subjects 1987* (Ottawa: Minister of Supply and Services Canada, 1987) [hereinafter "MRC"].

500. B.M. Dickens, ed., Guidelines on the Use of Human Subjects (Toronto: University of Toronto, Office of Research Administration, 1979).

501. MRC, supra, note 499, 24-25; Dickens, ibid., 30-33, 36-37.

502. The University of Toronto guidelines hold that "compensation must not be so great that it is an excessive inducement. As a general rule, pro-rated compensation should never exceed the hourly minimum wage ... [m]oreover, it is noteworthy that even a small compensation may be an unfair inducement to a person in financial distress." Dickens, *supra*, note 500, 37, and discussion, 36-37. The Medical Research Council guidelines are based on the same principles — compensation for expenses and payment at a level that does not induce persons to participate — but the Council allows for compensation for "reasonably assessed ... loss of wages." This would presumably result in paying poorer research subjects less money than wealthier research subjects, which seems somewhat problematic. See MRC, *supra*, note 499, 24, and discussion, 24-25. Both the University of Toronto and the MRC guidelines state that subjects should be compensated even if they decide to leave a study before its completion. Dickens, *supra*, note 500, 37; and MRC, *supra*, note 499, 25.

503. This argument is made by Titmuss, *supra*, note 94, 151 and generally. The Reid Report suggests that suppliers be informed that, should a recipient bear a child that is handicapped because of the supplier's deliberate deception about his family's genetic history or his own medical history, the supplier will be liable to support the child. If the supplier was honest, and yet a handicapped child was born, he would not be liable. This requirement would give suppliers a significant incentive to reveal all that they know about their medical and genetic history. However, the level of payment that we recommend is non-inducing, such that those who choose to participate would not have an incentive to lie about their history. Reid, *supra*, note 16, 33-34.

504. Limits could also be set on the number of times that one supplier could provide materials for research.

505. This agency could be a joint federal-provincial undertaking. Coordination between provinces would seem necessary.

506. See, e.g., the Reid Report, *supra*, note 16, 56-57, with regard to release of non-identifying medical and genetic information; and Glover, *supra*, note 19, 82-83, with regard to both the release of non-identifying information and the number of children to be genetically parented by an individual gamete donor.

507. We will say "he" with regard to the unconsenting spouse, because the most likely situation — that of a spouse attempting to obtain supplied materials without her partner's consent — would be a heterosexual woman attempting to obtain donor sperm. It is difficult to imagine situations whereby the male partner could conceal

his use of supplied materials or services: a woman whose male partner made use of a gestational services agreement would, of course, know that the child was not gestated by her. Lesbian women would also be unable to conceal their use of supplied materials: a lesbian woman would obviously be aware that if her partner became pregnant the child would not be genetically related to herself. Deceptions with regard to the male partner using supplied sperm or the female partner using supplied ova as part of the couple's use of IVF are possible, though probably very unlikely. In any event, a provision requiring that the other spouse be informed should one spouse decide to make use of supplied materials would be a protection in both the most likely situation (of a heterosexual woman making use of donor sperm without informing her male partner) and any possible less likely situations.

508. The Reid Report recommends that "If the husband does not consent a notation should be made on the wife's consent form and on the records. The husband should not be named as father on the child's birth registration and no support obligations will be created." See Reid, *supra*, note 16, 33. The Ontario Law Reform Commission took a different approach, recommending that the husband or partner be "presumed as a matter of law" to be the father of the artificially conceived child, subject to rebuttal, with the onus of proof on the person who would seek to rebut the presumption. Ontario LRC, *supra*, note 105, Vol. 2, 176-78.

509. Reid, supra, note 16, 33.

- 510. The prospective recipient may, of course, lie about having a spouse. The situation of a boyfriend a man who does not cohabit with the recipient but whom she could attempt to name as the child's father is also somewhat ambiguous. We cannot see a solution to these problems, except to ask the prospective recipient whether she has a male sexual partner, and record his name and address, before informing her that he will be notified in the event of her making use of the materials. This too is clearly problematic, as it borders on deceiving the potential supplier. The least objectionable approach would seem to be to allow the risk of being deceived as to the child's genetic parenthood to remain with the male partner and to rely upon the recipient's honesty.
- 511. However, under current family law provisions, even if a man were to separate from or divorce his wife prior to the child's birth, he could still be legally presumed to be the father of a child born after the time of separation (a presumption that he would be required to rebut on a balance of probabilities). For the conditions under which a person is presumed to be the (biological) father of a child, see the Ontario Children's Law Reform Act, R.S.O. 1990, c. 12, s. 8.
- 512. See, e.g., the Ontario Family Law Act, R.S.O. 1990, F. 3, s. 1(1) and 31(1). Section 1(1) includes within the definition of parent "a person who has demonstrated a settled intention to treat a child as a child of his or her family." However, it must be recognized that when an order for support of a child is made, the court "should … recognize that the obligation of a natural or adoptive parent outweighs the obligation of a parent who is not a natural or adoptive parent" as one factor in determining the amount of child support that each party is required to pay. See s. 33(7)(b).
- 513. The authors note their appreciation to Donna M. Marchand, a student at the University of Toronto Faculty of Law, for suggesting this point.

- 514. One could also imagine a situation in which a supplier of fetal material might choose to meet with the demander.
- 515. This is similar to the situation of research participants. It seems reasonable to permit an opt-out since participation in the project is theoretically driven by altruism: if the subject changes her mind about exercising her altruistic sentiments, she ought to be permitted to leave. See MRC, *supra*, note 499, 25; and Dickens, *supra*, note 500, 27.
- 516. The birth mother is prohibited from giving consent to an adoption until seven days after the baby's birth, and she is then permitted three weeks within which time she can change her mind. Child and Family Services Act, S.O. 1990, c. 11, s. 137(8).
- 517. In the words of the Medical Research Council of Canada, "[s]ubjects should not be offered such rewards for participation as will constrict their freedom to leave a study. Reimbursement should therefore be as expenses are incurred." MRC, supra, note 499, 25. See also Dickens, supra, note 500, 37.
- 518. The requirement that this information not be released until the child has reached the age of majority is a part of the recommendations outlined in note 506, supra.
- 519. Hollinger, *supra*, note 122, argues that if "the felt need for such information does in fact become more widespread, and in the event that future research substantiates the still tentative claim that disclosure makes a positive difference for AID, IVF, or ET children," the state should facilitate "the possibility of disclosure" of identifying information about suppliers (924). We would adopt an entitlement of non-disclosure, subject to the supplier's consent to disclosure, at the present time; however, we would agree with Hollinger that if it became well established that children born of supplied materials felt a strong need to know about their genetic parents, legislation could be established to make that possible. However, we would recommend that such legislation be prospective only, such that suppliers who, prior to the legislation, provided materials on the understanding that their identity would be kept confidential would not have that trust violated.
- 520. We would permit sex selection on purely medical grounds, e.g., when sex-linked genetic disorders are a strong possibility.
- 521. See the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), s. 27.
- 522. This is the position taken in the Reid Report, supra, note 16, 31.
- 523. Some might be prompted to wonder whether the situation of exchanges of fetal material within the family would arise, given the current availability of fetal material from unintentional pregnancies that ended in abortion. We would speculate that if the "abortion pill" (RU-486; mifepristone) were to become available in Canada, the availability of fetal material would decline significantly. If treatments using fetal material became more widespread, demand would rise. If these eventualities materialize before fetal tissue culture practices develop to the point where substantial amounts of tissue can be produced and sustained, it would seem reasonable to anticipate that a shortage of fetal material could result.
- 524. See Raymond, supra, note 91.

- 525. This would mean that the providers of the genetic material (the commissioning individual[s]), would *not* be legally presumed to be the parents of the child until the expiry of the opt-out period.
- 526. Subject, of course, to the standard unfitness caveat of social welfare legislation (see below).
- 527. See, e.g., Posner, Sex and Reason, supra, note 133, 422-23.
- 528. Field, *supra*, note 218, discussed in Trebilcock and Keshvani, *supra*, note 199, 584. Note that Field proposes this approach as a second-best solution to prohibiting or rendering unenforceable all gestational service arrangements, partly in recognition of the deeply held and diverse views on the subject that seem for the moment to permit only a compromise solution.
- 529. Once custody of the birth mother was assured in this manner, the question of paternal visitation rights would need to be addressed. It is our position that these visitation rights should be strictly prohibited once a birth mother has opted out of the gestational service arrangement. Anything less would defeat the very purpose of the opt-out clause, and would also create the potential for damaging future litigation, potentially harmful to the child.
- 530. The Model Human Reproductive Technologies Surrogacy Act recognizes a 72-hour period immediately after the birth of the child, during which the birth mother may retain custody over the child provided that she executes and delivers notice in writing of her intention to keep the child. See R.P. Bezanson, S.F. Kurtz, and B. Hovencamp, "Model Human Reproductive Technologies and Surrogacy Act: An Act Governing the Status of Children Born Through Reproductive Technologies and Surrogacy Arrangements," *Iowa Law Review* 72 (1987), 973-89 (Status of Children of the New Biology Drafting Seminar, 1986-87, University of Iowa College of Law). We believe that a 72-hour period is not long enough to enable the birth mother to fully consider whether she is willing to surrender the child. The unfitness caveat in Ontario is found in the Child and Family Services Act, R.S.O. 1990, c. 11, s. 37.
- 531. See, e.g., the Ontario Child and Family Services Act, ibid. George J. Annas has made a similar recommendation. See Annas, *supra*, note 188, 414.
- 532. See, e.g., the Ontario Child and Family Services Act, ibid., s. 137(8).
- 533. We concede that this "cost" could also be avoided by a strict parental presumption in favour of the father. For the reasons we have outlined, however, we believe that it is more in the child's interest for custody to be presumptively granted to its mother.
- 534. We would require that all demanders of gestational services be medically incapable of gestation. We are uncomfortable at the thought of men and women using a gestational service arrangement purely for convenience, because they themselves did not want to take the time or effort to conceive and gestate a child.
- 535. Examples of the kind of questions that would have to be addressed in counselling (for both the gestational mother *and* the commissioning individuals) are provided in M. Harrison, "Psychological Ramifications of 'Surrogate' Motherhood," in *Psychiatric Aspects of Reproductive Technology*, ed. N.L. Stotland (Washington, DC: American Psychiatric Press, 1990).
- 536. Datgle v. Tremblay (S.C.C.) [1989] 2 S.C.R., 530.

- 537. Sorkow J. took this position in the  $Baby\ M$  trial (1987), supra, note 179, Sorkow J., 1159.
- 538. Lori Andrews agrees. See Andrews, "Alternative Modes of Reproduction," *supra*, note 47, 365-66. "The surrogate should be able to engage in whatever activities she wishes, to refuse any medical consultations or treatments, and to abort or not abort based on her own decisions." At 386-87: "The protection of the surrogate's bodily integrity must be guaranteed."
- 539. We suggest that the only limit on a woman's ability to offer her gestational services be the genetic limitation discussed in the context of gametes and preembryos established in the previous section. One woman should not be allowed to provide genetic material to more than 10 children.
- 540. The issues of reimbursement following the use of more dangerous abortion techniques designed to preserve fetal tissue or organs, and the prolonging of pregnancy to procure fetal tissue or organs at a more desirable developmental stage, are discussed *infra*.
- 541. Robertson agrees, arguing in favour of commodification only "in those instances in which the abortion is performed solely to obtain tissue for transplant." Robertson, *supra*, note 35, 491.
- 542. Hillebrecht, *supra*, note 339, 385: "A statute that requires a determination of why a woman became pregnant not only makes enforcement a nightmare, it also faces constitutional attack on a number of levels."
- 543. See also Annas and Ellis, supra, note 380, 1082.
- 544. Childress, supra, note 372, 114.
- 545. United Kingdom, supra, note 376, 6.5.
- 546. Robertson, *supra*, note 35, 469, n. 80.
- 547. Childress, supra, note 372, 115.
- 548. Ibid.
- 549. An opportunity to withdraw consent after the abortion has taken place is also recommended by Annas and Ellis, *supra*, note 380, 1082.
- 550. Morgan, supra, note 342, 144, 149.
- 551. Sedlak, supra, note 358, 80.
- 552. A fetal tissue processing company isolates the required cells from the fetal tissue obtained from non-profit retrieval agencies, and causes the cells to proliferate so that small amounts of fetal tissue can be used for many patients. Burlingame, supra, note 36, 221. In addition, the company processes the fetal tissue to decrease the possibility of rejection of the tissue by the recipient-host. "[B]ecause fetal tissue is genetically simple and immunologically undeveloped, laboratory processes can eliminate the few structures that could trigger immune responses in recipients." Ibid.

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# Appropriating the Human Being: An Essay on the Appropriation of the Human Body and of Its Parts

Jean Goulet



#### **Executive Summary**

This essay discusses the role played by the law in regulating behaviour while ensuring compliance with societal values and principles, especially with respect to the use of the human body and its parts. It describes the differences between the common law and the civil law, and in particular the distinction made by the civil law between things and non-things. Since the human body is a non-thing, it cannot be seen to be subject to a right of ownership; since it is sacred, it cannot be the subject of a commercial transaction. The changes in the Civil Code of Quebec in this connection are also discussed.

The author reviews the legal issues and moral principles related to the existence of a real right to appropriate a person and discusses the potential impact in this respect of the changes appearing in the new Civil Code of Quebec. The effort of Quebec's legislature to preserve certain cultural values and principles has been based on the following principles: the inviolability of the human body, the gratuitous nature of any alienation of any part of the human body, the participation of the medical profession in this process, and the establishment of ethics committees.

The author also discusses the uses of the human body, its parts, and its products (or "fruits") from a legal perspective, and he supports his presentation with a brief review of some key legal cases.

The author concludes that, even though the human body can no longer be regarded as unconditionally sacred, it cannot be intentionally sold without first taking certain societal values into consideration.

#### Introduction

The Royal Commission on New Reproductive Technologies has been given a mandate that is complex both in its diversity and in its subject matter. Who can attest with certainty, unless with experience gained from practice, to the consequences of practices that, since they concern the very reproduction of the species, affect the foundations of our culture and civilization? What question more troubling than this could a society ask itself that would have a more direct emotional impact on the set of values underlying its entire system of morals, ethics, and law?

This problem is especially acute in our multicultural country of Canada, since it is set in two different systems of law: Quebec society is governed by a set of norms that are based primarily on the civil law, whereas the norms in the rest of the country are based primarily on the common law. By sheer force of numbers, the common law system is liable to prevail where choices are to be made and support is to be given, and this would leave the civil law in the suffocating darkness that envelops the antechamber of oblivion.

The Royal Commission clearly has no desire to ignore values representative of the culture of a part of the Canadian population it wishes to hear and understand. To do so would also amount to ignoring the fundamental values and principles of a system rich in principles and standards that is based on an experience rooted in the very origins of Western civilization and that still applies today not only in Quebec but in a large number of jurisdictions on the European continent.<sup>1</sup>

In writing this essay, our ambitions will necessarily be held in check by its limited scope. We will begin by trying to evaluate the normative effect of legal discourse, comparing its language and messages with language and messages from other areas that also claim to govern human behaviour. We will then consider how one of them, the law, attempts through its civil law subsystem to resolve the problems arising from the appropriation in whole or in part of a very special object: the human body. Thus, we will begin by commenting on how the law appropriates actuality by way of the rules through which it is expressed before asking how this same law governs the appropriation of the human body through the norms of its positive law.

# Appropriation of Actuality by the Law

Non-jurists are often unable to conceptualize the law, as they quite naturally find it difficult to grasp the consequences of "juridicizing" a principle of behaviour. This comment may be especially valid in respect of health professionals, who are used to dealing with tangibles and are constantly confronted with sickness and sick people, and with specific problems and responses.

Legal rules come from a pharmacopoeia that the health professional probably finds quite disconcerting, since legal remedies are found in an intangible store with an abstract inventory and shelves holding nothing but books and formulas. The content of those books and formulas is not commonplace, however. Laws regulate and compel. It is therefore necessary to begin by developing a certain idea of what the law is in order to fully understand this phenomenon, which is both logical and of social significance.

#### A Certain Idea of What the Law Is

The law is an abstract concept. Communication is its essence, and it is composed of messages.  $^{2}$ 

These messages are in turn assembled in sets, and the purpose of those sets is to cause those at whom they are directed to behave in some particular way.

Health professionals are familiar with certain of these sets of norms (e.g., codes of ethics).<sup>3</sup> Over the past few years they have also been hearing, with ever growing frequency, talk about ethics, which is a modern-day substitute for a moral code. A distinction should be made between these two concepts to avoid confusion, however.

Thus, moralists deliver sermons. They promote good through exhortation.

Ethicists, on the other hand, use reason. They are philosophers. Unlike men and women of the church, who distinguish good from evil, they try to define what is right. Ethicists want to be able to define acceptable conduct.

As for jurists, their pretensions are different. They are modern and no longer want to be moralistic, religious, or instruments of what is right. They have become modest through experience and now content themselves with promoting order and social peace.<sup>4</sup>

Their new-found humility has not resulted in their eclipse, however. Jurists still wield a formidable power of coercion in both the civil and criminal spheres, and they expect citizens to obey their instructions.

Laws do not debate — they enforce.

Thus, the true dimension of the law derives from its coercive power. We will now proceed to a definition of the law in terms that will probably further clarify the true scope of this social phenomenon.

#### A Brief Definition of the Law and of the Legal Phenomenon

The law is the body of rules of conduct adopted by a society through the agency of the legislature it has constitutionally empowered to make laws.

The discourse of legislators is performative.<sup>5</sup> As the old saying goes, "they never talk for the sake of talking." In this way, they shape reality in accordance with their wishes.

#### The Normative Effect

This apparent power, which we would call the normative effect of legal language, is perplexing for scientists, who are accustomed to a different relationship with reality.

The philosopher Michel Serres has clearly understood and defined the strange role jurists can play in scientific matters. "The law comes before science," (trans.) he asserts in *Le contrat naturel*. Thus, its discourse, which is not open to question, appropriates reality, as Galileo learned long ago to his detriment.

When a deontological, moral, or ethical standard becomes a legal rule, its transformation is complete. It is now more than language, and more than a simple code of communication. It is a reality, and life must be led in accordance with its regenerated nature.

A new set has in fact been created. It is composed of rights and obligations.

A *right* is a prerogative. <sup>9</sup> It allows those who are entitled thereto to take certain actions.

An *obligation* is a constraint.<sup>10</sup> It turns those who bear it into debtors. It compels them to refrain from a specified conduct or to discharge a specified duty.

The citizen's behaviour is therefore predicated on the legal standard. Reality is patterned on the legal rule.

This rule is not invulnerable, though. It will not receive the support it needs to survive unless it is fully integrated into the cultural group to which it belongs. <sup>11</sup> The legislature is well informed only if it expresses its rules in accordance with a certain conception of the law.

#### A Certain Conception of the Law

The law is predicated on culture. To ensure that it has credibility and is respected, it must give expression to the basic social values of the governed group. Consequently, there are a number of legal systems that, each in its own way, express a certain conception of the law.

#### The Main Western Legal Systems

The law takes on a different hue from one jurisdiction to another. We see culture as the soul of a nation; it condenses a social group's values and viewpoints into a single whole. So it is not surprising that the standards

the group sets to govern the behaviour of its members are rooted in experiences drawn from its fundamental education.

Unfortunately, the limits of this essay probably require that we try to explain this complex subject through tired clichés. Yet is it not useful all the same to identify Paris with the image of the Eiffel Tower, or Quebec City with the silhouette of the Château Frontenac? Let us do the same.

There are two major legal systems in the Western world: the common law and the civil law. The rules of the common law stem primarily from judicial decisions. $^{12}$ 

Anglo-Saxons, it appears, are pragmatists. They resolve concrete problems as and when they arise. Thus, they draw principles they will subsequently observe from court judgments on an a posteriori basis.

It is said that Latin peoples, and more specifically the French, reason along Cartesian lines. They begin by establishing a priori principles, and then class problems in these logical and convenient pigeonholes. It therefore appears that laws, and the Civil Code in particular, are the source of the law in their legal world. But a cliché is a cliché — it may well be that their law derives instead from the more inclusive body of customs. Besides, a definition of the civil law will tell us more about this than a brief discussion of a generally accepted idea.

#### The Main Concepts of the Civil Law

The expression *civil law* covers the body of standards and rules that makes up the private law of jurisdictions culturally attached to the Latin world. That body is for the most part collected in a Civil Code, versions of which are to be found not only in France, but also in Belgium, Italy, and Quebec.

If we adopt Jean Carbonnier's theorem, we must state here that the civil law is indeed broader than its principal formal source, the Civil Code. <sup>13</sup> Each Civil Code constitutes the *jus commune* of the jurisdiction to which it applies and incorporates a customary law that was not repealed by the enactment thereof. The fundamental principles of that customary law, the origins of which are lost in the mists of time, are still in force. We will look at a few examples of this below and will use them in the purest tradition of the civil law by following a Cartesian process and employing the standard methodology of the civil law — analogy.

Thus, a civil law expert is a jurist who, in considering private law problems submitted to him or her, employs a reasoning based on concepts that complement the customary standards and Civil Code rules in force in the jurisdiction in which he or she practises. The task is complex and requires the person to, among other mental gymnastics, manipulate the main concepts of the civil law system and, more specifically, the person-obligation-goods triad.

Common law lawyers are also familiar with these concepts, which are so much a part of the stock-in-trade of the law that they are almost archetypal. To base sweeping conclusions on a common point that is so

superficial would be somewhat simplistic, however. The civil law and common law systems are clearly different, especially as regards the legal treatment of things, which is why it is now necessary to outline the structure of the civil law as it relates to things and to property.

If we approach the subject from this perspective, it must first be noted that the truly decisive *summa divisio* of the civil law is that which distinguishes things from "non-things." <sup>14</sup>

Anything that has material existence is a thing, unless it is a person. A person is a non-thing and can never be property since he or she has no patrimonial value.

The literature on the subject is unanimous: the human body is *sacred* and cannot be sold. 15

If we accept the principle that the person is unique, then we must also agree that it forms an indissociable unit, body and soul, in whole and in part. Furthermore, if we regard the whole to be sacred, the same is true of the parts. The corpse itself is legally recognized to be sacred, even in the cemetery that is its final resting place.

The position adopted by modern science does appear indirectly to confirm this opinion, since it no longer dissociates spirit from matter. However, its uniqueness is no longer "spiritual," but "material," as emotions and thoughts are now reduced to a few chemical reactions.

Some philosophers have cast doubt on these assertions, though. One of these is Aurel David. <sup>17</sup> He makes a distinction between the person and his or her biological substratum, that is, the human body. In other words, he dissociates body and soul, opening the door to the possibility of reification of the human body and, thus, to its potential appropriation. Is the legislature of today going to agree with him? We will now look at what is going on in the contemporary civil law.

#### Conclusion

By distancing themselves from the Declaration of the Rights of Man and of the Citizen, <sup>18</sup> and from the individualistic philosophy of the Enlightenment that inspired it, the drafters of the new Civil Code of Quebec have chosen in the positive law provisions thereof not to express certain concepts that the drafters of the Civil Code of Lower Canada had imported from France's Civil Code and from the Declaration, which preceded it. Thus, the notion of *sacredness* has been formally set aside, with the result that the human body no longer appears to be protected as sacred except by a custom that has not been repealed, although the new positive law rules to the opposite effect have inevitably reduced that custom's influence.

These changes to the civil law were to be expected. Cracks had already been appearing in the structure for a long time. The first had appeared in 1932 and 1933, when Louis Josserand<sup>19</sup> and Andrée Jack<sup>20</sup> successively challenged the notion that the human body is not for sale.

The irresistible pressures of science and modern medicine completed the task of persuading the Quebec legislature to reify the human body at least in part.

As a result, the law of the new Civil Code of Quebec now dissociates personality from the physical body of the human being.

Thus, article 3 of the new Code first recognizes a list of extrapatrimonial rights, which is the first indication that the legislature has recognized the *personality* of the human being. Other provisions found in articles 33 to 41 will protect the person's privacy in conjunction with the statement of principles to the same effect found in section 5 of the Charter of Human Rights and Freedoms, so legal commentators no longer have room to doubt as regards our formal law that the concept of *personality* has been incorporated into the new Code.

Nor do articles 10 to 25 permit us in the second place to question the National Assembly's determination to reify the human body. Although the first paragraph of article 10 reiterates the principle of the sacredness of the human body from the point of view of its inviolability, articles 19, 22, 23, and 24 leave very little room for doubt. In these provisions, the legislature recognizes a right to alienate parts of the human body, and this necessarily implies a reification of the object, which is in this case the physical human body. At civil law, with the exception of the *res communis*, <sup>23</sup> which obviously cannot include the human body, it is only non-things that are not for sale.

Thus, it would appear from what we have seen so far that by changing its language the law has drawn closer to the situation in the real world, which it reappropriates through its new discourse by authorizing, at least in part, the reification of the human body. This choice will of course have an impact on the appropriation of this new component of property law, although it is not clear what form that impact will take. We will therefore try now to shed a little light on these questions by analyzing the problem of the appropriation of the person by real rights.

# **Appropriation of the Person by Real Rights**

The appropriation of the person by real rights opens a fearsome legal Pandora's box halfway. Not only does it bring into conflict ideas that are contradictory in principle, but its application could even lead to situations the results of which are absurd in concept and excessive in practice. An obvious consequence of this is that it would be sensible at this point to determine the exact magnitude of the obstacles placed by this legal and cultural choice on the uneven path of our legal advancement.

# Interplay of Concepts and Legal Rules

The very etymology of the term *real right* warns us of the problems that are going to stimulate our imagination.

The term *real* is of course derived from the Latin word *res*, which means *thing*. Furthermore, the classical definition of a real right easily confirms this understanding, since a real right is "one conferring on its holder direct and immediate power over a thing without the intervention of another person" (trans.).<sup>25</sup>

In contrast to a personal right,<sup>26</sup> the object of which may be a prestation other than a thing, by definition a real right cannot exist in the absence of a thing. A real right bears upon the thing itself, from which it cannot be separated, somewhat in the manner of Roman law, under which the right and the thing itself merged to form the *dominium*, or right to own property (*proprietas*).<sup>27</sup>

Thus, the real right is theoretically incompatible with the notion of a

person, which is not a thing, is not for sale, and is almost sacred.

From the outset, the appropriation process appears to be almost irremediably blocked by the antinomy between the two concepts of person and thing. What is more, traditional civil law experts appear to have so much trouble understanding this process that they hardly ever define the person, but limit themselves to declaring, as does article 1 of the Civil Code of Quebec, that "every human being possesses juridical personality." <sup>28</sup>

Imagining that they have in this way isolated these conflicting concepts in separate categories such that contact between them is no longer possible except through obligations, civil law experts ask no further questions. They should, however, as the human body is a physical object, and there are some who will, for reasons that may be noble but are sometimes sordid, seek to appropriate parts of that object, which is inadequately isolated in the category of things that are not for sale. To succeed, appropriation requires that certain preconditions be met; once successful, it inevitably has consequences.

# The Legal Phenomenon of Appropriation

Thus, it is impossible to appropriate an object unless it is a thing, and, as we already know, this process entails problems in respect of persons. The problems are even more complex in respect of the consequences of that appropriation, which open the way to absurdity.

If we reify the human body, which is a precondition for the appropriation thereof, and acknowledge that the rules governing the right of ownership apply thereto, logic dictates that it be subject to usufruct, emphyteusis, and even alienation pure and simple, which takes us back to the time of slavery. Fortunately, other legislative provisions will prevent the unspeakable from occurring, although this legislative policy nevertheless calls into question the scale of values used to assess our legal standards.

Thus, reification of the human body paves the way for use of the person. That being the case, does it legalize surrogate motherhood, which

has until now been prohibited by the customary standards of public order and good morals? It might have been necessary to answer this question in the affirmative were it not for the fact that article 541 of the Civil Code of Quebec formally prohibits the practice of surrogacy.

In this way, contemporary law comes to the rescue of the old standards, and it does so up to the highest levels of our legal hierarchy. Indeed, it does so up to the quasi-constitutional level of the Charter of Human Rights and Freedoms, <sup>29</sup> which extends certain forms of protection to the human body.

Although articles 2 and 5 of the Charter, which concern the right to assistance and the protection of privacy, respectively, are of interest on this subject, article 1 is even more to the point. It articulates the customary standard on respect for the person restated in article 19 of the Civil Code of Lower Canada, which is in force today, 30 and article 10 of the Civil Code of Quebec, which will soon be implemented.

At the time of writing, Quebec law relating to the human body derives from articles 19 to 23 of the Civil Code of Lower Canada, which will be replaced sometime in the future by the standards found mainly in articles 10 to 25 of the Civil Code of Quebec, and in articles 42 to 49 where corpses are concerned.

Inasmuch as the civil law constitutes a body of inter-related standards, other provisions inevitably come into play to complete those just mentioned. For example, the civil liability provisions<sup>31</sup> open the door to judicial actions that sanction those rights and obligations. From there, we should proceed at the judicial level to the Code of Civil Procedure, or branch off toward special standards found in statutes<sup>32</sup> or specific regulations,<sup>33</sup> to arrive at the limits of the law applicable to the matter at hand, namely the appropriation of parts of the human body. But to stay within our mandate, which is limited to the traditional civil law, we will not take that path. The rules found in articles 374ff. of the Civil Code of Lower Canada, or in articles 899ff. of the Civil Code of Quebec, which concern the law of property, cannot be ignored, however.

Those rules are obviously numerous. What is more, they are different, and that means *totally* different, from the equivalent property law standards of the common law.

At civil law, all property has one owner, and *only one* owner. It is difficult, if not impossible, to find anything in the civil law that corresponds to the common law notion of *interest*.<sup>34</sup> The right of ownership found in article 406 of the Civil Code of Lower Canada, or in article 947 of the new Code, is closely akin to that found in article 544 of France's Civil Code, the real right *par excellence*, with its fundamental attributes and characteristics. Thus, the civil law right of ownership is permanent, general, and exclusive.

In theory, it also applies to a thing, which returns us to the problem raised above: can the human body, which is as material as any other

thing, be appropriated?

The answer we gave above was negative, although we added that the situation may well be changing. We will now offer some opinions and suggest more specific labels to show how, and in what cases, the legislature has safeguarded the basic principle of the sacredness of the human body, which is fundamental to the civil law, while at the same time moving toward the reification of the person in response to pressures from modern medicine.

# Application of the Concepts and Rules

As you will have guessed, all these contradictions can be reconciled only through the affirmation of principles and the practical application of rules. We will now review the solutions adopted by the legislature in both these respects.

#### Moral Principles

In their wisdom, legislators are always reluctant to disrupt the status quo. Thus, they endeavour to preserve the cultural values and principles on which the accepted order of society is based. It is in this spirit that they reaffirmed in the new Code the customary principles recognized in the "old" civil law before making the concession of drafting standards derived from the new reality.

The resulting combination is a curious picture that can be outlined by means of four revealing illustrations.

The first principle stated by the legislature has already been noted. Article 1 of the Civil Code of Quebec repeats the affirmation previously found in article 19 of the Civil Code of Lower Canada that the human body is inviolable.

Some bright minds might sense vestiges of old religious practices in these provisions, and maybe even the indirect influence of the spirit of the canon law. We consider this opinion to be mistaken, however, as it instead originates in the (French) Declaration of the Rights of Man and of the Citizen, which itself originated in the philosophy of the Enlightenment and the revolutionary spirit of the late eighteenth century. Civil law jurists, from the nineteenth-century interpreters to their modern-day successors, have salvaged, rather than invented, this generous principle.

Again preoccupied with keeping a clear conscience, the legislature has usually upheld the principle that alienation of parts of the human body must be *gratuitous*. The principle was stated in the third paragraph of article 20 of the Civil Code of Lower Canada and reappears in article 25 of the new Code.<sup>36</sup>

We should not be unfairly cynical toward the legislature, however. This provision has proven to be most useful in practice, as it prevents both a sometimes less-than-honourable trafficking in human body parts and the establishment of "body shops" by unscrupulous individuals. Safeguards

will still be needed to prevent the clandestine operation of such businesses, and preventive criminal sanctions may be desirable in such cases.

Medical intervention is the third aspect of the clear conscience shield with which the legislature systematically lards its standards concerning protection of the human body. Once again, the intention is beyond reproach. No one disputes the decisive role played by physicians in dispensing health services or their importance to their patients. However, the powers conferred on them in some circumstances remain open to question. For example, the second paragraph of article 44 of the Civil Code of Quebec grants physicians a decision-making right, the long-term effects of which might well border on the illicit were they to contribute to the unwarranted circulation of materials worthy of the respect due to sacred things. It stands to reason that the circulation of "replacement parts" should at the very least be carried out under the indirect supervision of ethics committees, which constitute the fourth instrument of clear conscience concerning protection of the human body found in our contemporary legislation.

Unheard of only a few years ago, *ethics committees* have come to occupy a place of importance in medical research and the practice of medicine. They have become the darlings of hospitals, and jurists themselves have become fond of such committees. Their popularity can probably be explained by the impetus given them by France's Comité national d'éthique,<sup>37</sup> and their establishment in places where the uncontested rule of behaviour has until now been the cosiest hands-off attitude should be applauded.

The ethics committee now makes its appearance in the third and fourth paragraphs of article 21 of the new Civil Code. It is a welcome addition, even if its role is limited to the narrow sphere of medical experimentation. The committee has no recognized role with respect to any form of alienation of human body parts.

Moreover, this limitation is accompanied by another real weakness. No provision in the present law specifies the composition of ethics committees. Practice suggests that they will consist mostly of hospital staff representatives and, above all, physicians. Thus, the committees could well be composed of individuals who are at once judges and interested parties, and their members could either be in a conflict-of-interest situation or be unwilling to incur the displeasure of colleagues who could be in a position to obstruct their own research in the near future.

Furthermore, the very idea of the ethics committee provides food for thought. What do we really expect from this institution, which is mandated to apply neither coercive legal standards nor even a clearly defined body of rules, and which could end up being unfocussed and, perhaps, overly accommodating?<sup>38</sup>

As things now stand, the human body is neither inviolable nor truly sacrosanct. We will now look at the practical and supposedly pragmatic solutions put forward by the law and the jurisprudence, which contradict

the reassuring conceptual myths found in the fundamental principles proclaimed by the legislature.

#### Pragmatic Rules

Thus, we will now consider the human body in a legal rather than juridical perspective, that is, from the clearly defined viewpoint of specific rules rather than from the slightly distorted angle of declarations of principle. We will consider the human body from all angles, looking at it first as a whole made up of natural components and artificial adjuncts before gradually moving away from it, going from its fruits to the products that derive therefrom.

#### A Physical Whole

As we have already said, because the human body is a physical object, it can be reasonably considered a thing. An age-old legal custom places the body of a living person in a class apart, although it has not been that long since the days of the lucrative slave trade. Although it would be pointless to discuss the problem of appropriation of the human body, the solution for which seems so obvious, we will return to it below because of the decision in *Moore*.

The question of "using" the human body is not insignificant, however. It includes the problem of individuals in an "irreversible" coma,<sup>39</sup> and our comments do not concern the legal status of the corpse.

The *Milhaud* case<sup>40</sup> caused a considerable furor in France a few years ago when a physician conducted experiments on a patient described as a "vegetable." Although the proceedings did not take place in a civil court and do not therefore concern us here, they enable us to point out that it is as mandataries, and not as the owners of a physical object improperly likened to a vegetable, that the close relatives of a person who is incapable of giving his or her consent are authorized to speak on his or her behalf.<sup>41</sup>

The temptation to treat persons in an "irreversible" coma as objects becomes even stronger when it comes to the remains of a deceased individual.

The Civil Code of Lower Canada classifies corpses as sacred things. 42 They are consequently neither for sale nor subject to appropriation. 43 However, these rules have not been adopted by the new Civil Code of Quebec. 44 Should it be concluded from this silence that the legislature intends to overthrow the old order?

It is not unreasonable to answer this question in the affirmative. Articles 42ff. of the Civil Code of Quebec grant the person priority when it comes to deciding what is to become of his or her body after death. Although the legislature in this way respects the personality of the individual concerned, it seems to us in so doing to dissociate the personality of the individual from the physical nature of his or her body, which consequently becomes a thing that can be appropriated.

This right is not as new as it appears to be at first glance. Time can play a decisive role in this respect: for example, our museums are

recognized as owners of the mummies, skeletons, and other human artifacts stored within their walls. The same is true of our medical schools, as the cadavers received by their dissection rooms bear a strong resemblance to things that have been appropriated.<sup>45</sup>

Developments in modern medicine have given rise to situations that are even more delicate where human body parts are concerned.

#### Dissociable Parts

It was an American decision — that rendered in *Moore v. Regents of the University of California*<sup>46</sup> — that brought the problem of the appropriation of the human body and of its parts into the limelight. The facts of the case bear repeating, for they are not incompatible with the issues that could be drawn therefrom at civil law.

In October 1976, John Moore learned from his attending physician, Dr. David W. Golde, that he had a rare form of leukemia. He consequently underwent a variety of forms of treatment, including the withdrawal of extensive amounts of blood, bone marrow, and other bodily substances, and even the removal of his spleen.

Throughout this time, the substances removed from John Moore's body were not disposed of, but were instead used as the basis of research by Dr. Golde and his team, which was soon to be successful. Indeed, their efforts had convincing results, and they were awarded a patent on a cell line quite appropriately called the "Moore Cell Line."

When he finally learned of his involuntary contribution to science, John Moore went to court to claim royalties from the commercial exploitation of the cell line derived from substances removed from his body. He based his argument on what he considered his right of ownership over his body and claimed, to use the language of the civil law, a right to follow with regard to the parts thereof.

Two decisions were rendered in the case. The first, in a proceeding incidental to the hearing on the merits of the case, recognized Moore's limited ownership interest in his body and opened the way to the subsequent consequences that were the inevitable result of this choice.<sup>47</sup> One question inevitably presents itself to us as civil law jurists: would the outcome of a similar case argued along similar lines in our legal system have been identical?

We feel that the question would have to be answered in the negative. In framing articles 10ff. of the Civil Code of Quebec, the National Assembly has set out standards in respect of the human body that are based not on ownership<sup>48</sup> but on control by the person over his or her own body. It is therefore in this spirit that we must now approach the problem: a person does not own his or her body but exercises a degree of control over it that is recognized and governed by the law.

The question that remains to be asked concerns the composition of the human body, and whether it is possible to dissociate its component parts as potential candidates for appropriation.

It should be mentioned here that the human body is made up of the biological parts that form its constituents and the prostheses that form extensions thereof. A somewhat quaint part of French jurisprudence considered with all seriousness the issue of whether dentures could be seized and whether a creditor could exercise a right of retention over them. Fortunately, it was held that such prostheses, once installed, become an integral part of the human body and are consequently protected by the exemption from seizure. The jurist Roger Perrot attaches to them the vivid expression of "person by destination" (personne par destination). 50

Thus, if the human body can be distinguished from personality, it forms a whole that can be neither seized nor alienated. But can its parts nevertheless be dissociated therefrom for future alienation?

The Civil Code of Quebec clearly answers this question in the affirmative. According to article 19 of the Code, a person may alienate parts of his or her body *inter vivos*. As a result of this new provision, the traditional rules of the civil law take on a hitherto unrecognized dimension, which in our view justifies a theory on appropriation of the human body and of its parts that we will, for the sake of convenience, call the *theory of gradual distancing*. This would be a good time to explain our theory.

#### Theory of Gradual Distancing

The basic premise of the theory of gradual distancing is that the legislature never talks for the sake of talking and that it does not therefore dissociate parts from a whole unless it intends to reserve a special treatment for the parts thus specifically identified. The standards that follow in such circumstances are usually exceptions to a rule of the *jus commune*.

Starting from this assertion, we will consider the human body in three stages.

# Level 1 Distancing

Level 1 distancing is based on the most general way in which the human body can be considered in the overall legislative framework.

According to the generally accepted principles of philosophy or modern science, the dualist theory that distinguishes mind from matter should be dismissed, and the soul and the body, that is, the personality and its physical substratum, should be considered as one.

However, the new Civil Code of Quebec takes the opposite course, specifically dealing with personality rights in article 3 and reserving long blocks of articles (arts. 10 to 49) for the human body, living or dead.

Thus, contrary to the attitude it adopted in 1866, the legislature now places considerable importance on the physical aspect of the person and dissociates the two branches thereof.

#### Level 2 Distancing

This same legislature nonetheless considers the human body to be a comprehensive entity. Not only does the legislation read this way, but the jurisprudence itself — although from French courts — confirms this principle by including as integral parts of the human body any prostheses grafted thereon if necessary.

Here, as earlier, however, the legislature once again undermines the basic unitary principle by authorizing, in article 19, the dissociation of parts or elements from the whole of the human body, no longer, as was the case before, for reasons of curative surgery but for reasons defined very broadly by the vague concept of the benefit that is anticipated. This concept therefore rules nothing out. It covers both medical research and benefit to a third party through, for example, an organ or bone marrow transplant.

The legislature's choice is obviously not without effect, but what are its true consequences in legal terms? Are we to conclude therefrom that, having become "autonomous," these dissociated elements change in nature, and that rather than remaining "persons" or "parts of persons," they have now become "things"?

We believe this is indeed the case.

The human person cannot be alienated. This principle of the civil law is fundamental.

In this very case, however, article 19 of the Civil Code of Quebec authorizes the alienation of an object that we can in no way continue to avoid calling a "thing" without circumventing the rules of logic and classifying its alienation under the overly convenient label of an exception.

The legislature treats these new things with respect, as their alienation must in all cases be gratuitous (see art. 25 C.C.Q.). However, respect does not mean sacredness. These objects are never sacred. They are therefore, with some restrictions, within the purview of trade and can be appropriated or disappropriated.

Is this conclusion shocking? It may be, but we are nevertheless going to go even further.

#### Level 3 Distancing

In the next few paragraphs, we will maintain, with support from the jurisprudence, that as the distance increases between the part dissociated from the human body and both the body itself and the comprehensive entity of the individual from whom it comes, the restrictions on its circulation will decrease accordingly.

Applying the principles of this theory, it must be agreed that, unless it is separated only temporarily for curative purposes, a part removed from the human body with the consent of the person concerned becomes a thing, an object that can be appropriated, movable property that is initially owned by the person from whom it originates but can be alienated to any other person to whom it is properly assigned.

The legal status of this thing is therefore governed by the ordinary rules of property law. For example, it cannot be deemed to have been abandoned;<sup>51</sup> in all circumstances, abandonment must be proven through documents demonstrating the informed consent of the donor or through the presentation of evidence demonstrating that the person concerned has no interest in the part from his or her body. At this point, circumstances return us to the second decision rendered in the *Moore* case<sup>52</sup> due to what we will again call the distancing factor.

From the previous account of the facts of the case, it will be recalled that John Moore claimed royalties from the commercial exploitation of the Moore Cell Line, although the cell line in question had been produced following research by Dr. Golde and his team.

In a decision handed down by the Supreme Court of California, the payment of such sums to the plaintiff was denied on the ground that the original cell line removed from John Moore and the cell line produced by Dr. Golde's team were totally distinct, both factually and legally. In other words, the value added to the original line by the research of Dr. Golde's team was so great that the distance between the new line and the original line no longer warranted the inference of a significant connection between the new product and the plaintiff's person.

The relevance of this decision to our civil law will of course be questioned once again. It will again be asked whether a court applying the rules of our legal system would have come to the same decision.

Given the facts of the case, we would be inclined to answer this in the affirmative, although a form of reasoning also leads us to the same conclusion.

While Dr. Golde's team was working on substances removed from John Moore's body, Moore continued to be their owner, since he had never abandoned his interest in the substances removed from his person. As can be seen from the evidence submitted to the court, however, a new thing was produced from the original objects taken by the researchers. In other words, Dr. Golde's team had, within the meaning of article 972 of the Civil Code of Quebec, "worked on or processed material which did not belong to [it]." Their processing of the original material was worth far more than the material used, which means, it seems to us, that they could claim sole ownership of the Moore Cell Line under the rules governing movable accession. <sup>53</sup> We accordingly feel that a Quebec court ruling on the facts in *Moore* within a civil law context could have rendered a decision identical to that of the California court for reasons based on our property law as a whole.

Thus, it appears from the above discussion that, although the human body cannot be appropriated in its entirety, despite the provisions of the Civil Code of Quebec that allow for reification, its parts can be appropriated when dissociated therefrom in the manner provided for by law.

Jean-Christophe Galloux was therefore right<sup>54</sup> — the human person can change the destination of his or her constituent parts.

But is this assertion valid at every level at which the person could "break up" into different components? This is the question we will now consider, beginning with the very intimacy of the person before gradually distancing ourselves therefrom.

#### **Natural Fruits**

The last portion of our study will be based on an analogy drawn from property law, the intention of which is definitely not to show disrespect for the human person although it is founded on the concepts of fruits and products, <sup>55</sup> which are better suited to things than to persons.

The hypotheses we have enunciated so far have resulted in dissociations so closely linked to the material aspects of the human body as to require some sort of aggressive or invasive medical procedure. But is it not possible that certain parts of the human body might break away from their original "support" on their own without the need for deliberate external intervention?

As will be seen from the following examples, the answer to this question is of course yes.

Our first examples of this concern are what we will somewhat improperly call the fruits of the human person, namely, as you will have guessed, the fetuses and embryos borne by the female person.

We know from the Supreme Court of Canada judgments in *Morgentaler*<sup>56</sup> and *Daigle*<sup>57</sup> that the human fetus is not a person. It therefore exists as a part of its mother's body and can no more be appropriated than any of the other biological parts surrounding it. But what happens to it when it is expelled from its place of incubation?

If it is born alive, it is then a person and can as such no more be appropriated than its mother. Parents do not own their children. They are responsible for them and have custody of them by virtue of their parental authority.<sup>58</sup>

If, however, the fetus is not viable when separated from its mother, it must be admitted to be a thing in the same way as an appendix removed from an ordinary patient. It can then be appropriated and alienated if the mother who produced it consents. Neither the Civil Code of Quebec nor any statute in force in that province grants the fetus any form of sacredness that would place it in the category of objects that are not for sale. It is even doubtful that a fetus removed from its mother's body in a non-viable state is a dead body: it did not die, since it was never alive.

The fetus therefore becomes a thing, sharing this fate with the embryo, which is not a person either, since it was never born. The rules governing parts of the human body must therefore be applied, *mutatis mutandis*, to fetuses, embryos, ova, and gametes of all kinds. They have something of the nature of the human body as long as they are integral parts thereof, but then become things once removed therefrom.<sup>59</sup>

Should we now follow a similar logic for what we will call the products of the human body? Let us consider this question more closely.

Products That Can Be Sold

Through natural processes, the human body produces substances that separate from it simply as a result of the laws of nature. These include tears, perspiration, menstrual discharges, excrement, and urine. We would add semen and ova to this list.

Since these substances begin as integral parts of the human body, we must treat them in the same way as we have treated the parts of the human body. They can therefore be appropriated and alienated once they have separated from the body and have entered the category of things that are for sale. Movables in the ordinary sense of the term, they are therefore subject to the normal rules of the Civil Code and are presumed to belong to their original possessor. They cannot be validly alienated without valid consent for a conclusive reason.

Thus, there is nothing new to this point, but wait for what follows.

Recent advances in medical science and continuing developments in biochemistry and other related technologies of the health sciences have made it possible to design and manufacture products derived from parts of the human body that are ultimately remedies for afflictions as serious as, to give one example, Parkinson's disease. The *Moore* case, which we discussed above, provides a good illustration of this, especially because it enables us to add artificial products created through combination, such as cell lines concocted in a laboratory, to our list of natural products.

Should this type of commerce be considered to be unlawful or in any way prohibited by the law?

Nothing, at least nothing in the Civil Code, prohibits trafficking in such products, which have considerable market value. These goods can be both appropriated and alienated. Moreover, to follow the line of argument upheld by the Supreme Court of California, 63 the final products are completely different from what they were in their initial state. To give, with reference to the right of accession, an example dear to classical civil law jurists, we might say that the statue produced by a sculptor, even out of material belonging to another, is completely different from the block of marble from which the artist's skill has wrested a harmonious form.

Some of these products, because of their marketability, are patented and can be exploited by the patentees. Should exception be taken yet again?

Every form of commercial exploitation applicable to property should be open for these products, which, as we have just seen, are now far removed from the persons they originally came from.

Although it is possible that some will be shocked by this commercial exploitation of life, it is still necessary to know what life really is. We would personally hope that the principle on which our existence is based is the personality of the human being rather than just his or her physical

existence, 64 although the body, the inseparable companion of the soul, should be neither forgotten nor scorned, as the precepts of a misunderstood religion were for a long time wont to do.

#### Conclusion

The legislature appears to be handling these matters with greater circumspection than have theologians, as it has had to take new circumstances into account. Conscious of the progress of medical science, and perhaps on final analysis (a little like Bartha Maria Knoppers on the subject of the genetic heritage)<sup>65</sup> acknowledging the human being's collective responsibility toward his or her fellow human beings, it has carefully opened the way to the sound management of the well-being of society. Would it therefore be disparaging the person by partially reifying the body, which it makes possible in the new Civil Code of Quebec?

It would be troubling to see the person become, as some authors have suggested, <sup>66</sup> the subject of a right of ownership or of real rights. But that is not the case here. These provisions appear to us to grant human persons a right of control over themselves, in the same way as it is recognized that they can control the information flowing from and circulating around them. <sup>67</sup> As a result, it is not shocking to note that the biological constituents of a person's material being can in some circumstances be found among ordinary things — appropriated and appropriable, for sale, and alienable — provided that this change has been authorized and legitimated by a consent that is unquestionably free and informed.

The concept of liberty has many aspects, and this is one of them.

# **Epilogue**

Unlike other normative disciplines, such as moral philosophy or ethics, the law enacts rules to which the state accords the formidable and effective privilege of public sanction.

Most of these rules reach the citizen in the form of written messages, whether consolidated into structured norms or flowing logically from judicial authorities. The first case is typical of the civil law, whereas the second is typical of the common law.

Quebec's legal system belongs to a family of systems governed basically by a civil code. The document currently in force already dates back to 1866, but a new body of norms is to be promulgated within the next few months.

As we noted above, the new Code treats the human body from a modern perspective that allows for some degree of reification and even authorizes the alienation of parts of the body under certain conditions.

However, we feel that the new Code does not, despite the wording of its transitional provisions, repeal the civil law tradition that the human person, and the body forming a part thereof, deserves the veil of respect due to the receptacle of life and of humanity itself.

Although no longer sacred, the human body is still an object that cannot be placed on the open market without consideration of a set of values we cannot disregard, as to disregard them would lead to a scandalous traffic society does not need. Scientific progress does not justify excess, and the physical well-being of persons does not justify all forms of behaviour, not even those that are curative.<sup>68</sup>

#### Notes

- 1. Belgium, Spain, Italy, and Switzerland have civil codes, but this list is far from exhaustive.
- 2. This is the argument put forward in J. Goulet, La machine à faire le droit (Quebec: Presses de l'Université du Québec, 1987).
- 3. See Code of Ethics of Physicians 113 Gazette officielle de Québec II (23 December 1981) 4062. Quebec's legislation contains many such regulations, which are adopted by various professions by virtue of the powers they are granted under the Professional Code, R.S.Q., c. C-26.
- 4. This understanding of positive law has been and still is being followed by the classical civil law jurists of yesterday and today, including the Mazeaud brothers (L.-H. Mazeaud, J. Mazeaud, and F. Chabas, *Leçons de droit civil*, 7th ed. (Paris: Montchrestien, 1989)), J. Carbonnier (*Droit civil*, 5th ed. (Paris: Montchrestien, 1991)), and G. Cornu (*Droit civil* (Paris: Montchrestien, 1988)).
- 5. We assume that *discourse* means a form of thought formally structured in a language coloured by "logical typing" (see G. Bateson, *Mind and Nature* (Toronto: Bantam Books, 1980), 209-10; and the same author in "A Theory of Play and Fantasy," in *Steps to an Ecology of Mind* (Toronto: Chandler Publishing, 1972), 180) that is used to express it. For further information on performative language, see G.A. Legault, *La structure performative du language juridique* (Montreal: Presses de l'Université de Montréal, 1977).
- 6. M. Serres, Le contrat naturel (Paris: François Bourin, 1990), 120.
- 7. Professor Christian Atias of the Faculty of Law of the Université d'Aix-Marseille made a similar argument in a lecture he gave in August 1989 at that university's summer school. C. Atias, *Sciences des légistes: savoir des juristes* (Aix-en-Provence: Presses universitaires d'Aix-Marseille, 1991).
- 8. On this subject, see the excellent article by Isabelle Stengers, "Les affaires Galilée," in Éléments d'histoire des sciences, ed. M. Serres (Paris: Bordas, 1989), 209-49.

- 9. See Private Law Dictionary and Bilingual Lexicons (Montreal: Quebec Research Centre of Private and Comparative Law, 1988), 181.
- 10. *Ibid.*, 139. Maurice Tancelin very accurately distinguishes the meaning of this expression, which is narrower at common law, where it comes closer to the more limited idea of payment; see M. Tancelin, *Des obligations: contrat et responsabilité*, 2d rev. ed. (Montreal: Wilson and Lafleur, 1986), 1, para. 1.
- 11. Today, few jurists will disagree with this assertion, although its acceptance was less certain prior to the publication of M. Sparer and W. Schwab, *Rédaction des lots:* rendez-vous du droit et de la culture (Quebec: Conseil de la langue française, 1980).
- 12. It includes all those principles and rules that take their authority from customs recognized in England since the dawn of time, and from court decisions that have force of law by virtue of the rule of *Stare decisis*.
- 13. After Jean Carbonnier's first theorem, which reads: "The law is broader than its formal sources"; see J. Carbonnier, *Flexible droit: pour une sociologie du droit sans rigueur*, 6th ed. (Paris: Librairie générale de droit et de jurisprudence, 1988), 20.
- 14. This image has been repeated, although with some modifications, by Frédérick Zénati in Les biens (Paris: Presses universitaires de France, 1988), 1, para. 1. But see also H. De Page, Traité élémentaire de droit civil belge, Vol. 5, with co-author R. Dekkers, Les biens (Brussels: E. Bruylant, 1952), 525-26, para. 531; and the same R. Dekkers, "Aspects philosophiques," in Le corps humain et le droit, Travaux de l'Association Henri Capitant, 1975, Vol. 26 (Paris: Dalloz, 1977), 1. This brings to mind another approach by Jean Carbonnier (supra, note 13), which makes a distinction between law and non-law. Classical authors instead make a distinction, due to instincts developed in their training, between things and property; see, for example, P.A. Malaurie and L. Aynès, Les biens (Paris: Cujas, 1990), 11.
- 15. On this point, we could quote every classical civil jurist, as they unanimously share the same opinion. They repeat an old principle of the civil law that is both uncontested and incontestable. We could be surprised by what comes next, however.
- 16. Is it really necessary here to cite the vast number of publications that have come out on the subject over the last 15 years? We will simply note the distinction made by Guy Lazorthes in *Le cerveau et l'esprit: complexité et malléabilité* (Paris: Flammarion, 1982), 184, between the concepts of soul (âme) and spirit (esprit). The author associates the soul with the "principle of a spiritual and moral life that is immortal and judged by God" (trans.), and the spirit with "the intellectual faculties as a whole" (trans.).
- 17. A. David, La structure de la personne humaine: limite actuelle entre la personne et la chose (Paris: Presses universitaires de France, 1955). This argument was partially restated in Jean-Christophe Galloux's excellent doctoral thesis, "Essai de définition d'un statut juridique pour le matériel génétique," Université de Bordeaux I, Faculté de droit et de science politique, 1988; but it is contradicted by H.Ph. Visser't Hooft in "Les actes de dispositions concernant le corps humain: quelques remarques philosophiques," Archives de philosophie du droit 24 (1979): 87-94.
- 18. This text has been discussed in a number of publications, but we would like to draw the reader's attention to Stéphane Rials' comments on the subject in *La déclaration des droits de l'homme et du citoyen* (Paris: Hachette (coll. Pluriel), 1988).

- 19. L. Josserand, "La personne humaine dans le commerce juridique," Dalloz Recueil Hebdomadaire de Jurisprudence, 1932, chronique, 2.
- 20. A. Jack, "Les conventions relatives à la personne physique," Revue critique de législation et de jurisprudence 53 (1933): 362-95. The author did not question the principle of the integrity of the human body, but, as Josserand had already suggested a year previously, she did admit the lawful nature of agreements of which human beings are the object, such as an insurance contract.
- 21. This provision reads as follows: "Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy."
- 22. R.S.Q., c. C-12.
- 23. The *res communis* is a thing that belongs to no one and that cannot be appropriated since its use is restricted to no one; see Malaurie and Aynès, *supra*, note 14, 53, para. 163; Zénati, *supra*, note 14, 30, para. 18; and article 913 of the Civil Code of Quebec.
- 24. There have been so many successful grafts and transplants since Louis Washansky received a new heart, thanks to Professor Christian Barnard, on 3 December 1967. The problem today is illegal trading in human organs.
- 25. J.-L. Bergel, *Le droit des biens* (Paris: Presses universitaires de France, 1983), 5; P. Dupont Delestraint, *Les biens*, 10th ed. (Paris: Dalloz, 1989), 1; Malaurie and Aynès, *supra*, note 14, 78, para. 351; Zénati, *supra*, note 14, 51, para. 41; J.-L. Baudouin, *Les obligations*, 2d ed. (Montreal: Yvon Blais, 1983), 24, para. 12.
- 26. See the definition given by Baudouin, *tbtd.*, 25, para. 13. The reader will remember the definition of an obligation in B. Starck, *Drott ctvtl: obligations* (Paris: Librairies techniques, 1972), 5, para. 1.
- 27. On this subject, see the philosopher-jurist Michel Villey's comments in "Notes sur le concept de propriété," in *Une critique de la pensée juridique moderne* (Paris: Dalloz, 1976), 187-200.
- 28. G. Hubrecht and G. Vermelle, *Drott ctvtl*, 14th ed. (Paris: Sirey, 1987), 29; A. Weill and F. Terré, *Drott ctvtl: Les personnes*, *la famille*, *les incapacités*, 5th ed. (Paris: Dalloz, 1983); R. Savatier, *Cours de drott ctvtl*, Vol. 1, 2d ed. (Paris: Librairie générale de droit et de jurisprudence, 1947), 19, para. 29.
- 29. Supra, note 22.
- 30. It should be noted here that, as we write these lines in May 1992, it is the 1866 Civil Code of Lower Canada (C.C.L.C.), and not the Civil Code of Quebec (C.C.Q.), that is in force.
- 31. See arts. 1053ff. C.C.L.C. or arts. 1457ff. C.C.Q.
- 32. There are many statutes that deal with the health sector, but we will limit ourselves here to illustrating our comments with the most "celebrated" of these: the Act Respecting Health Services and Social Services, R.S.Q., c. S-5.
- 33. Once again, a list of such texts would be long (e.g., the Code of Medical Ethics 103 *Gazette officielle de Québec* (6 November 1971), 8091), but it would go beyond our mandate to try to list them here. For this sort of information, the reader should instead consult specialized works such as that of A. Lajoie, P. Molinari, and

- J.-M. Auby, *Traité de droit de la santé et des services sociaux* (Montreal: Presses de l'Université de Montréal, 1981).
- 34. To paraphrase *Black's Law Dictionary* (St. Paul: West Publishing, 1990), interest is the most general and most varied form of title that can be held in an object at common law. Neither the special modes nor the dismemberment of property found in the civil law comes close to this concept, which in the English legal system is a form of title to property and not a way of possessing something, as is the case at civil law. For an explanation of these civil law concepts, see G. Goulet et al., *Théorte générale du domaine privé*, 2d ed. (Montreal: Wilson and Lafleur, 1986), items 9 to 13.
- 35. This Declaration was adopted by France's National Constituent Assembly on 26 August 1789; the 1791 text is reported by J.-C. Masclet in *Textes sur les libertés publiques* (Paris: Presses universitaires de France (Coll. Que sais-je?), 1988), and by Rials, *supra*, note 18.
- 36. The principle of gratuitousness is a constant feature of French legislation on this subject; see, for example, Loi n° 76-1181 du 22 décembre 1976 (J.O. 23 décembre 1976, p. 7365) relative aux prélèvements d'organes (known as the Caillavet Law), art. 3.
- 37. This committee, which is both active and very influential, was established in 1983 by Décret n° 83-132 portant sur la création d'un Comité consultatif national d'éthique pour les sciences de la vie et de la santé, the text of which, as amended by the *décrets* of 9 August 1983 and 6 February 1986, can be found in France, Conseil d'État, *Sciences de la vie: de l'éthique au droit*, 2d ed. (Paris: Documentation française, 1988), 188. The original text can be consulted in France, Conseil d'État, *Éthique médicale et droits de l'homme* (Arles: Actes Sud, 1988), 105.
- 38. What indeed are these *ethics*, which constitute an unconsolidated set of standards, and the configuration of which appears so variable to a jurist in quest of certainties? According to Guy Bourgeault, who has dealt quite brilliantly with these questions in *L'éthique et le droit face aux nouvelles technologies biomédicales: prolégomènes pour une bioéthique* (Montreal: Presses de l'Université de Montréal, 1990), the relationships among technology, ethics, and the law call for a new alliance.
- 39. This is the coma known as "stage 4," which is equivalent to brain death, where the brain is destroyed.
- 40. There were in fact two cases, known as the "Amiens" cases, involving Professor Milhaud in 1985 and 1988. The professor has given his point of view in A. Milhaud, Testaments de vie (Paris: Barrault, 1988). Professor Milhaud was later acquitted of the charges against him.
- 41. In his treatise on the civil law, Dean Cornu quite rightly underlined the terminological inaccuracies that characterize the use of words related to the patrimony concept. "The human body is not a thing," he says, "it is the person him/herself" (trans.). And then he goes on, "We are dealing here with being, not with having" (trans.). (See G. Cornu, *Droit civil*, *supra*, note 4, 165, para. 479.)
- 42. Article 2217 C.C.L.C.
- 43. U.S. courts have dealt with the legal status of corpses on several occasions and have at times held that they can be appropriated (see *Schioendorff v. Society of New*

York Hospital, 105 N.E. 92 (1914); Sinal Temple v. Kaplan, 127 Cal. Rptr. 80 (Cal. App. 1976)). In discussing corpses, they have spoken of quasi-property (see Cohen v. Groman Mortuary Inc., 41 Cal. Rptr. 481 (Cal. App. 1964)) or of property rights of a special nature (Smart v. Moyer, 577 P. 2d 108 (1978)), and have even been ready to deny absolutely that such a right might be possible (see Enos v. Snyder, 63 P. 170 (1900)). French courts have been more categorical on the subject as they have declared that a corpse can be neither sold nor appropriated (see Trib. civ. Seine, 20 December 1932, Gazette du Palais of 20 December 1932). They have even refused to issue a patent for an embalming process in order not to liken the human body to goods (see Trib. corr. Seine, 14 March 1844, Gazette des Tribunaux of 15 March).

- 44. Maybe the legislature should have spoken on this subject. We can never sufficiently underestimate the depth of human stupidity. A deplorable case reported in the *Gazette du Palais* of 26 January 1983 concerned a divorced husband who claimed visiting rights for his dog and likened the animal, for the purposes of legal argument, to the child referred to in article 254 of France's Civil Code or article 357 of the Penal Code. His suit was fortunately thrown out, as the courts had the good sense to hold that a dog is by nature a movable (see Gérard Vincent's comments in "Une histoire du secret," in *Histoire de la vie privée*, ed. P. Ariès and G. Duby, Vol. 5: *De la Première Guerre mondiale à nos jours*, ed. A. Prost and G. Vincent (Paris: Seuil, 1985-87), 172).
- 45. On this subject, see the Public Health Protection Act, R.S.Q., c. P-35, ss. 54ff.
- 46. Moore v. Regents of the University of California, 249 Cal. Rptr. 494 (Cal. App. 2 Dist. 1988), which we will call the first Moore case, and Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990), which we will call the second Moore case. These decisions have been discussed in a number of commentaries. See J. Lavoie, "Ownership of Human Tissue: Life After Moore v. Regents of the University of California," Virginia Law Review 75 (1989): 1363-96; M.W. Havens, "A Patient's Commercial Interests in the Products of Genetic Engineering: The Brave New World of Moore v. Regents of the University of California," Medical Trial Technique Quarterly 36 (1990): 137-50; S.A. Mortinger, "Spleen for Sale: Moore v. Regents of the University of California and the Right to Sell Parts of Your Body," Ohio State Law Journal 51 (1990): 499-515; J.J. Howard, "Biotechnology, Patients' Rights, and Moore v. Regents of the University of California," Food, Drug and Cosmetic Law Journal 44 (1989): 331-58. See also "Whose Tissue Is It? Moore v. Regents of the University of California," Glendale Law Review 10 (1991): 141-57; C.C. Horan, "Your Spleen Is Not Worth What It Used To Be: Moore v. Regents of U.C.L.A.," Creighton Law Review 24 (1991): 1423-48; K.G. Biagi, "Moore v. Regents of the University of California: Patients, Property Rights, and Public Policy," Saint Louis University Law Journal 35 (1991): 433-62; M. Ivey, "Moore v. Regents of the University of California: Insufficient Protection of Patient's Rights in the Biotechnological Market," Georgia Law Review 25 (1991): 489-533.

Quebec authors are not unaware of this decision either. Those who have referred to it include B. Knoppers, "La personne et la génétique en droit privé québécois: un droit de maîtrise?" in Histoire d'un génôme: population et génétique dans l'est du Québec, ed. G. Bouchard and M. de Braekeleer (Quebec: Presses de l'Université du Québec, 1991), 510; the same author in Human Dignity and Genetic Heritage (Ottawa: Law Reform Commission of Canada, 1991); and E. MacKaay, "Penser l'information génétique en droit québécois," in La génétique humaine: de

l'information à l'informatisation, ed. B.M. Knoppers, L. Cadiet, and C.M. Laberge (Montreal: Thémis, 1992), 34.

- 47. Moore v. Regents of the University of California, 249 Cal. Rptr. 494 (Cal. App. 2 Dist. 1988).
- 48. We refer once again to the comments of Dean Cornu we quoted above, *supra*, note 4.
- 49. See Court of Appeal of Douai, 14 October 1983, and Trib. inst. Lille, 16 November 1983, J.C.P. 1985.II.20365, note X. Labbée; and Civ. 1re, 11 December 1985, and Civ. 1re, 9 October 1985, *Gazette du Palais* 1986.I.150, note P. Bertier, "Touche pas à mon dentier." These rulings were discussed by Roger Perrot in "Procédure de l'instance: jugements et voies de recours. Voies d'exécution et mesures conservatoires," *Revue trimestrielle de droit civil* 84 (1985), 454.
- 50. "How is it possible that the law was placed in the service of an exercise in such bad taste?" (trans.), exclaims Roger Perrot, supra, note 49.
- 51. At civil law, abandonment is the favoured method for terminating an appropriation. It is "an act by which the owner renounces his right, leaving the thing without a master" (trans.) (Zénati, supra, note 14, 41, para. 25). "Abandonment implies the owner's desire to stop owning the thing" (trans.), add the brothers Léon-Henri and Jean Mazeaud together with François Chabas in their Leçons de droit civil, supra, note 4, Tome II, Vol. 2, 293, para. 1585. This is also the opinion of William deMontmollin Marler in The Law of Real Property: Quebec (Toronto: Burroughs, 1932), 142, para. 352. You will note that this idea was taken up in the first Moore decision: Moore v. Regents of the University of California, 249 Cal. Rptr. 494 (Cal. App. 2 Dist. 1988).
- 52. Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990).
- 53. Article 408 of the Civil Code of Lower Canada defines the right of accession as follows: "Ownership in a thing whether moveable or immoveable gives the right to all it produces, and to all that is joined to it as an accessory whether naturally or artificially." This definition is valid for the new Code. The accession in question here relates not to the person of John Moore, which is at civil law not for sale, but to the part of his body that was removed therefrom, which does become a thing in the sense we saw above.
- 54. J.-C. Galloux, "Réflexions sur la catégorie des choses hors du commerce: l'exemple des éléments et des produits du corps humain en droit français," *Cahters de droit* 30 (1989): 1011-31. The reader should also consult the excellent thesis by the same author: "Essai de définition d'un statut juridique pour le matériel génétique," *supra*, note 17.
- 55. "All those products that a thing produces periodically without altering or sensibly reducing its substance" (trans.) constitute fruits at civil law (Malaurie and Aynès, supra, note 14, 152, para. 160; F. de Fontette, Vocabulatre juridique (Paris: Presses universitaires de France (Coll. Que sais-je?), 1988), 58; Private Law Dictionary, supra, note 9, 80; Dupont Delestraint, Les biens, supra, note 25, 7; deMontmollin Marler, supra, note 51, 86; Zénati, supra, note 14, 86, para. 71). A product is derived from a thing without periodicity, and with alteration or exhaustion of its substance. It is most respectfully, and only for purposes of illustration, that we liken the child to the fruit of its mother's body.

- 56. R. v. Morgentaler, [1988] 1 S.C.R. 30.
- 57. Tremblay v. Daigle, [1989] 2 S.C.R. 530.
- 58. M. Castelli, *Précis du drott de la famille* (Quebec: Presses de l'Université Laval, 1987), 176.
- 59. This opinion is not shared by Jean-Louis Baudouin and Catherine Labrusse-Riou in *Produire l'homme: de quel drott?* (Paris: Presses universitaires de France, 1987), 190, but it appears that the new Civil Code of Quebec now requires a different interpretation. The fetus cannot, by definition, be a thing like any other. Should special provisions be enacted to control trade in or the treatment of fetuses? We think so, although we decline to answer the question here, as we choose to limit our comments solely and exclusively to the civil law context.
- 60. See Galloux, *supra*, note 17; see also B.M. Dickens, "The Control of Living Body Materials," *University of Toronto Law Journal* 27 (1977), 182; and *Venner v. State*, 364 A.2d 483 (1976).
- 61. Art. 2267, first paragraph, C.C.L.C. This provision does not appear to have an equivalent in the new Civil Code. What rule will therefore apply? Res tpsa loquitur?
- 62. On 7 May of last spring, the Henri-Mondor Hospital in Créteil carried out, with the approval of the Comité national d'éthique français, an intra-cerebral grafting of fetal tissue in patients with Parkinson's disease (see J.-Y. Nau, "Une thérapeutique expérimentale de la maladie de Parkinson: des greffes intra-cérébrales de cellules fœtales ont été pratiquées en France," *Le Monde*, 8 May 1992).

It appears to be perfectly legal in California for a woman to become pregnant and then voluntarily to abort and donate fetal tissue to members of her family who have Parkinson's disease; see J.S. Bregman, "Conceiving to Abort and Donate Fetal Tissue: New Ethical Strains in the Transplantation Field — A Survey of Existing Law and a Proposal for a Change," *U.C.L.A. Law Review* 36 (1989): 1167-1205.

- 63. Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990).
- 64. "Life and the person are not one and the same" (trans.), says Jean-Christophe Galloux in "La distinction entre la personne et la chose," in *Nouvelles technologies et propriété* (Montreal: Thémis, 1991), 214.
- 65. B. Knoppers, Human Dignity and Genetic Heritage, supra, note 46.
- 66. Isabelle Panisset, a researcher at the Centre de droit public of the Université de Montréal, offers a critical review of some of these theories, including the slightly curious theory of "innate property" (biens tnnés), in an article to be published in Revue Juridique Thémis: "Qualification et disposition du matériel génétique en droit civil québécois."
- 67. On this subject, see B. Knoppers and H. Guay, "Information génétique: qualification et communication en droit québécois," *Revue générale de droit* 21 (1990): 545-606. We also feel that Ejan MacKaay was right when he said that, in the cases we are dealing with here, the ownership of information is often based on structures rather than on traditional units, which tend to be tangible and identifiable; see E. MacKaay, "La propriété est-elle en voie d'extinction?" in *Nouvelles technologies et propriété* (Montreal: Thémis, 1991), 217-47.

68. The second paragraph of article 44 of the Civil Code of Quebec, which authorizes two physicians to remove parts of a dead body with no consent other than their own, appears to us to fall into that category.

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# The Civil Code of Quebec and New Reproductive Technologies

# Monique Ouellette



#### **Executive Summary**

Like the industrialized countries and the other provinces of Canada, Quebec has been concerned for several years about the legal and ethical problems raised by new reproductive technologies (NRTs). In 1981, when the Civil Code of Quebec (family law) was enacted in part, provisions were included on filiation due to artificial insemination. According to those provisions, the filiation of a child so conceived may not be contested if the husband has given his consent.

In the decade that followed, there was an intensive effort of research and reflection, as a result of which the Civil Code of Quebec was assented to on 18 December 1991. Articles 538 to 542, which govern medically assisted procreation, provide that procreation and gestation agreements are absolutely null. The Code is the product of a consensus to create an equitable social balance, and it reflects the clearly stated opinions of the Conseil du statut de la femme and the Barreau du Québec, to mention only two organizations.

The National Assembly included the provisions concerning medically assisted procreation under filiation. The new technologies fall under family law, and it is in this perspective that they must be examined. Family law is a branch of civil law, which is a matter under provincial jurisdiction. These new technologies have ramifications and

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consequences that extend far beyond the borders of Quebec. The problem affects Canadian society as a whole, and the choices made by Quebec provide an illustration of the options that are tolerable and acceptable to this province. In this respect, the Civil Code of Quebec could serve as a source of inspiration.

The inclusion of NRTs in family law and the law of filiation does not imply that they do not have an impact on various other areas of civil law. In other jurisdictions these questions are based on human rights and fundamental freedoms. Quebec law is no exception to this rule. In order to fully delimit the problems of NRTs, any reflection must include the provisions of the Code concerning the enjoyment and exercise of civil rights, individual rights, including the requirement of consent to care, organ donations, and experiments, and the protection of privacy. The general principles of contract law are essential to an understanding of the subject. We will note immediately that it is necessary in analyzing the law of Quebec to isolate gestation agreements from the other technologies. Only agreements of this kind are prohibited in relatively clear terms. Questions of anonymity, confidentiality, and research into one's family history must also be included in our reflection.

Given the above comments, we propose to study the treatment of NRTs in the Civil Code of Quebec in relation to three aspects. First, we will analyze the legal principles of contract law as they relate to NRTs. Then we will analyze fundamental rights, care, and experiments. Finally, filiation and medically assisted procreation will be examined. A concluding section will contain our reflections on some of the questions raised by the Commission.

### Introduction

On 1 January 1994, the Civil Code of Quebec (C.C.Q.) will replace the Civil Code of Lower Canada (C.C.L.C.), which has been in force since 1866. The extensive reform effort that began almost 30 years ago was concluded when Bill 125 was assented to on 18 December 1991. The preliminary provision of the legislation, which describes the nature of the Civil Code, reads as follows:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

The Code, which is the source and foundation of the civil law of Quebec, devotes a few articles to the subject of medically assisted procreation. One part of the Code, which has been in force since 1981, already

indirectly recognizes the validity of artificial insemination. Other articles will be added to this when the new legislation comes into force in its entirety in early 1994. The implementation legislation (the content of which was not yet known in May 1992) promises some additions, and possibly some surprises.

Although Quebec is the only province that has passed legislation concerning new reproductive technologies (NRTs), its law nevertheless remains incomplete. The Civil Code, which is the product of a consensus reflecting a particular "vision of society," states what is and is not acceptable to that society. The choices that have been made were inspired by consultations with, *inter alia*, the Barreau du Québec and the Conseil du statut de la femme. The reflection has only just begun and must continue.

The National Assembly has attached medically assisted procreation to the civil law and the law of health, but this does not mean that these questions, the scope of which extends far beyond the borders of Quebec, cannot be considered in greater depth — quite the contrary.

The relationship of NRTs to family law, and more specifically to the law of filiation, does not preclude them from having an impact on other areas of the civil law. To accurately delimit the problems raised by NRTs, our analysis must include the provisions of the Civil Code relating to the enjoyment and exercise of civil rights, the rights of personality, including the requirement of consent to care, organ donations, and experiments, and the protection of privacy. The general principles of the law of obligations are essential to understanding this subject.

With the exception of procreation and gestation agreements, the Civil Code of Quebec accepts the application of NRTs. Accordingly, it is necessary to distinguish these agreements from other types. Although the legislation related to NRTs is incomplete, it is nevertheless necessary to comment on the issues of anonymity, confidentiality, and research into one's family history.

The term used, namely *medically* assisted procreation, brings up the debate concerning the "medicalization" of maternity. While convincing arguments have been made in support of this, the position taken by the legislature is nevertheless based on everyday reality. NRTs form part of the care provided by fertility clinics attached to hospitals; such clinics treat problems of sterility or infertility. Medical follow-up provides certain health benefits, and from a legal point of view it ensures that the province has legislative jurisdiction.

The Commission's mandate, or at least some of the objectives thereof, extends far beyond NRTs. It is not possible in a document as brief as this to analyze every facet of those objectives in the light of the Civil Code of Quebec, no matter how new it is. Such an undertaking would be ambitious and, in some respects, purely speculative. Thus, it is necessary, while avoiding a narrow textual analysis, to accept the inherent limits of the legislation. We will nevertheless be considering certain legal questions

raised by the Commission.<sup>2</sup> Although the answers are sometimes confusing or non-existent, the Code does suggest certain avenues that may be explored with a view to clarifying our reflection.

In the light of the preceding comments, this analysis of the Civil Code of Quebec and NRTs will be divided into four sections. The first concerns the law of obligations, and procreation and gestation agreements. This is the approach adopted by the National Assembly. A second section will expand the discussion and engage in an analysis of the provisions relating to fundamental rights, care and treatment, and experiments. The third section concerns the law of filiation, within the limits of which the Civil Code of Quebec lays down the standards for medically assisted procreation. The final section then looks at the questions directly raised by the Commission. It will allow us to make a few brief comments on the state of thinking on this subject in Quebec.

## The Law of Obligations

Contracts form an essential part of the law of obligations and are subject to certain conditions that ensure their validity. The first group of conditions applies to all obligations and the second governs either particular elements or specific contracts.

## **Major Principles**

Every obligation has a prestation,<sup>3</sup> that is to say, an object. For the debtor, the prestation consists in doing or not doing something. The prestation must be possible, determinate, or determinable; it must be allowed by law and in accordance with public order. A cause justifies the existence of the obligation.

The parties must conduct themselves in good faith at all stages of the obligation from its creation to its performance or extinction. This provision is based on the general principle that "every person shall exercise his civil rights in accordance with the requirements of good faith."

The Code defines a contract as follows: "... an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation." A contract may be onerous or gratuitous. In the former, each party obtains an advantage in return for his or her obligation; in the latter, one party obligates him- or herself to the other for the benefit of the latter without obtaining any advantage in return.

Under Quebec law, a contract is created by the exchange of consents among parties having capacity to contract. The National Assembly has made the validity of certain contracts subject to conditions of form, for example that they be in writing or that witnesses be present. These are exceptions, as an agreement of wills is generally sufficient. Two further

elements are required: a contract must have a cause and an object. Let us look briefly at each of the components of a contract.

A contract is based on the consent of parties with the capacity to give consent. It is beyond the scope of this discussion to consider incapacity. Suffice it to note that the Civil Code contains many provisions that establish protective supervision along with the consequences of contractual legal activity of persons lacking capacity. A person lacks capacity if he or she is incapable of administering his or her property or of caring for him- or herself. Theoretically, a person lacking capacity who is under protective supervision may not validly consent to a contract. In some circumstances, however, a person may validly consent to care and treatment.

Consent to a contract is an express or tacit manifestation by a person who accepts an offer to contract made by another person. Consent may be given only in a free and enlightened manner; it may be vitiated by error, fear, or lesion. Defect of consent may be invoked by the party who is the victim thereof in applying for annulment of the contract.

The cause of a contract is the reason that determines each of the parties to enter into the contract. It is not essential for the cause to be expressed. If its cause is prohibited by law or contrary to public order, the contract is null.

The same is true of the object of the contract: if it is prohibited by law or contrary to public order, the contract is null. The Code defines the object of a contract as follows: "... the juridical operation envisaged by the parties at the time of its formation, as it emerges from all the rights and obligations created by the contract" (article 1412, C.C.Q.).

Under Quebec law, a contract exists if there is valid consent, together with a valid cause and valid object. A contract that does not meet these necessary conditions may be annulled. Nullity may be absolute or relative. It is absolute where the condition of formation sanctioned by the contract's nullity is necessary to protect the general interest. Absolute nullity may be invoked by any person who has a present and actual interest in doing so; the court may invoke it of its own motion. A contract that is absolutely null may not be confirmed.

Relative nullity is designed to protect a particular person or interest. Only the person in whose interest it is established may invoke relative nullity, which may be confirmed.

## **Procreation and Gestation Agreements**

This brief summary of the law of contracts was necessary since it was against this background that the legislature considered and prohibited procreation and gestation agreements. Article 541, C.C.Q., states: "Procreation or gestation agreements on behalf of another person are absolutely null." Neither the legislation nor the accompanying commentary defines the terms "procreation" and "gestation."

However, an analysis of the wording of the article suggests that a distinction must be made between these two terms. Dictionaries define "procreation" as the act of begetting and of giving life, and "gestation" as the period between implantation and birth in species that nourish an embryo, and then a fetus, by way of a placenta. The National Assembly is not opposed to all new technologies. Other provisions of the Code indicate that artificial insemination, for example, would not be contrary to public order. The objective, which is reiterated many times, is to prohibit "surrogate motherhood" contracts, the object of which would be contrary to public order. The use of the two terms reveals a certain degree of caution. All possibilities are contemplated: where the surrogate mother provides an ovum fertilized by the sperm of a third party, where the gametes are provided by third parties, and where the surrogate mother is responsible solely for gestation. It would be dangerous to interpret the provision as including all technologies.

The article reflects the unanimity of the recommendations submitted either during the deliberations of the National Assembly committee or during the preparatory work that led to the enactment of the Civil Code of Quebec. We should note, *inter alia*, the recommendations made by the Barreau du Québec:

17. That surrogate motherhood be strictly forbidden;

18. That surrogate motherhood contracts be declared to be contrary to public policy and that all the activities of intermediaries (lawyers, physicians, agencies ...) be liable to criminal penalties.<sup>5</sup>

The position of the Barreau du Québec was supported by the Chambre des notaires du Québec, which expressed the same opinion. The Conseil du statut de la femme has always been firmly opposed to surrogate motherhood. Article 541, C.C.Q., accordingly gained the Conseil's approval, although it felt that the penalty was not severe enough.<sup>6</sup>

The Civil Code of Quebec provides that procreation and gestation agreements are null. They are absolutely null and may not be confirmed. The existence of such contracts is contrary to the public interest, which is why the civil penalty is so severe. This doctrinal position is the result of a logical and rigorous analysis. In future, surrogate mothers will be working underground. We will now define the scope of article 541, C.C.Q., in concrete terms.

Surrogate motherhood may be practised in Quebec. Although it is illegal, Quebec courts will nevertheless refuse to intervene if the parties fail to comply with their undertakings. Thus, a surrogate mother who fails to hand the child over will dash the hopes of the parent or parents, who will be unable to turn to the courts to force her to do so. There is no legal procedure to enforce repayment of the sum paid. The surrogate mother herself has no remedy to force the parents to accept the child if they reject it or to exact payment of the promised amount if it has not yet been paid.

Three questions remain unanswered. The first concerns a surrogate mother who is inseminated with the sperm of a third-party "husband." She has a biological relationship with the child so conceived. Will our courts agree to hear an application for custody, and will they see an analogy between custody here and in a divorce case? Would this solution, which has been adopted in other jurisdictions, be accepted by our courts despite the illegal cause in the contract? Any answer would be speculative. A Quebec judge might refuse to hear a case arising from an unlawful agreement. However, the judge would hear the case of a child born of an adulterous relationship whose conception was not medically assisted. We submit, although we cannot say this with certainty, that the latter approach would be preferred because of the biological relationship, and because it reflects the best interests of the child.

The second question relates to penalties. The Civil Code provides that procreation and gestation agreements are absolutely null. Some have demanded much more severe penalties of a criminal nature. The spirit of the reform of the civil law excludes penalties of this kind. Occasionally, and very rarely, provision is made for punitive and exemplary damages. They are absent from the field of medically assisted procreation, and no intention to impose such damages has ever been expressed publicly.

This last point relates to the interests of the child, which are a subject of constant concern for the legislature, as a child should be protected even if his or her origin is "unlawful." This objective explains the measures we will be looking at on the topic of the other technologies. We would like to believe that, in the absence of explicit standards, the courts will use the general provisions designed to protect the child so as to minimize the stigma attached to his or her "irregular" birth. It would be unfortunate if new technologies, no matter how unlawful they are, reintroduced the notion of "illegitimacy," which has disappeared from our law.

The Civil Code of Quebec establishes the absolute nullity of procreation and gestation agreements. It conveys a definitive refusal to permit this reproductive technology. In so doing, the legislature has wagered that, if it eliminates recourse to the courts, few people will risk undertaking such a venture. This nevertheless creates a risk of clandestine activity, as was argued many times in support of legalizing such contracts. This reasoning was not adopted. Surrogate motherhood is unacceptable to Quebec society; it cannot be encouraged by legislative support. Since these contracts are null, it is pointless or impossible to provide for anything other than penalties.

## Fundamental Rights, Care, and Experiments

An analysis of NRTs must consider the provisions relating to fundamental rights. These include consent to care, experiments, and the

protection of privacy. We will look at the latter briefly when we consider anonymity and confidentiality.

## Juridical Personality and the Enjoyment of Rights

The Civil Code of Quebec states that: "Every human being possesses juridical personality and has the full enjoyment of civil rights" (article 1, C.C.Q.). The National Assembly has avoided, some would say wisely, becoming involved in the philosophical debate as to when life begins. The doctrine applied to date has not been repudiated.

According to a consistent and broad interpretation of article 617, C.C.Q. (formerly article 608, C.C.L.C.), juridical personality is acquired when a child is born alive and viable. The provision makes the rule governing succession more flexible and recognizes that children conceived but yet unborn may inherit as long as they are born alive and viable.

In *Daigle v. Tremblay*, which had a certain impact, two schools of interpretation collided. The first argued that the fetus enjoys juridical personality, subject to a resolutory condition. According to this argument, the fetus exists in legal terms from the moment of conception, although it will lose this status if it is not born alive and viable. This theory gives the fetus status as a person during the gestation period, with rights that a presumed father would be justified in asserting. The second school, which may be called the classical school, adopted a literal interpretation according to which juridical personality is acquired when a child is born alive and viable. The fetus is a person, subject to a suspensive condition, that is, it *must* be born alive and viable in order to acquire status as a person. The Supreme Court of Canada adopted the second theory, and the legislature has maintained the status quo.

The consequences of this "philosophical" choice can be imagined. The fetus has no civil existence, and no rights. It does not enjoy the protection given to those lacking capacity to consent. It also lacks the protection provided by article 3, C.C.Q., which recognizes that every person has "the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy." Other provisions, if any exist, will have to be applied to allow or prohibit experimentation on fetuses and the use of fetal tissue. To take the Supreme Court's view, a parent, and even a third party, cannot defend the rights of a being that has no legal existence. <sup>11</sup>

The preliminary provision states that: "The Civil Code of Québec, in harmony with the Charter of human rights and freedoms ... governs persons." This statement of principle is of no assistance since it concerns persons, and a child must be born alive and viable to acquire "status" as a person. This reflects the Supreme Court's position in *Daigle*.

## **Care and Organ Donations**

In the new Code, the National Assembly has elaborated upon the process begun in the old Code with respect to protection of the inviolability of the person, care and treatment, and organ donations. Some of these provisions have an impact on NRTs.

Article 10, C.C.Q., states the principle of a person's inviolability and integrity. Interference with his or her integrity is not permitted unless the person consents, or unless it is provided for by law. Consent to care is essential; this includes examinations, treatment, specimen taking, removal of tissue, and any other act. We will not be considering the provisions relating to substitute consent in the case of incapacity, nor those relating to confinement in an establishment and psychiatric examinations. It should be noted that consent is not required in an emergency if the person's life is in danger. Although they are interesting, the new rules on mandate in anticipation of incapacity have little impact on reproduction. Articles 19 to 25, C.C.Q., are of greater interest to us.

"A person of full age who is capable of giving his consent may alienate a part of his body *inter vivos*, provided the risk incurred is not disproportionate to the benefit that may reasonably be anticipated." Donations of gametes with a view to "participation in the parental project of another person by way of a contribution of genetic material" are therefore permitted. The proportionality test imposed by article 19, C.C.Q., is easy to assess: the risk is not excessive and the benefit, the satisfaction of performing an altruistic act, is not inconsiderable.

It is of course necessary to distinguish the methods used to obtain samples. The collection of male gametes does not involve invasive intervention, and the risks, in the absence of error, seem to be minimal. The same may not be true of the removal of oocytes, which is more invasive, painful, and dangerous. The situation is different again where "abandoned" surplus cells are given to third parties. Given the reservations stated earlier, a gamete donation that satisfies the proportionality test would be authorized under Quebec's civil law.

The validity of the donation is subject to two further conditions: it must be in writing, and it must be gratuitous. Article 24, C.C.Q., provides that consent to the alienation of a part of a person's body must be given in writing. Such consent is essential where surplus cells are to be offered to third parties. The question then arises as to the disposal of this human material if consent is denied. The Code is silent on this point. The National Assembly avoided the moral and ethical debate, as it said nothing about the fate of surplus fertilized ova resulting from *in vitro* fertilization. Consent is given in writing; it may be revoked at any time, even orally.

"The alienation by a person of a part or product of his body shall be gratuitous; it may not be repeated if it involves a risk to his health" (article 25, C.C.Q., first paragraph). This is a change from the provisions of the Civil Code of Lower Canada, which permit the sale of tissue

susceptible of regeneration. Sperm and ova are included in this category, as are blood, bone marrow, hair, and skin. The sanctity of the human body led the National Assembly to stress a principle of Quebec law: the human body is not for sale. If the body as a whole is not for sale, parts of the body are not for sale either, not even those that are capable of regeneration. Some find this provision too harsh and see it as a step backwards that will encourage "underground" activities. Others view it favourably and approve its recognition of the absolute sanctity of the human body.

The problems of penalty and liability remain. The Civil Code of Quebec does not establish a penalty for the sale of sperm and ova. Strictly speaking, penalties do not belong in a civil code. In the absence of a penalty, only the nullity of the transaction can prevent a donation of gametes that is not gratuitous.

The Code is also silent on the extra-contractual liability of the donors and other parties involved in the application of the new technologies. It must be concluded from this that the general rules of civil liability will apply. It will be enough to summarize the main elements of these rules briefly.

Extra-contractual civil liability is based on fault; that is, a failure to comply with the general obligation not to cause injury to others. Fault implies conduct other than that of a prudent and careful person placed in the same circumstances. Whether it involves commission or omission, fault requires compensation for the direct injury it causes. Thus, a physician who is negligent or careless in the operations or experiments of the new technologies will be sued within the limits of the *jus commune*. Given the stakes and the risks, it has been suggested that no-fault liability should apply to NRTs and to experiments. Although beneficial to potential victims, such a system would have seriously impeded the development of NRTs. Physicians would have refused to assume such a risk, and their insurers would have backed them up. The legislature has accordingly rejected the possibility of a derogation from the *jus commune*, although it must be recognized that it did not debate the question at length.

The *jus commune* also applies to gamete donors who withhold information, which is an omission that entails serious consequences for prospective recipient parents. The problem is much more one of evidence than of substantive law. The caution shown in fertility clinics nevertheless provides a substantial guarantee.

## **Experiments**

Some reproductive technologies are experimental in nature. It seems interesting to note the relevant provisions of the Civil Code of Quebec, to the extent that they can be applied.

Article 20, C.C.Q., enshrines the principle that a person of full age who is capable of giving consent "may submit to an experiment provided that the risk incurred is not disproportionate to the benefit that can reasonably

be anticipated." Here again, the proportionality test is decisive. The indefinite nature of the provision's closing words provides food for thought: is it the person alienating part of his or her body or submitting to the experiment who anticipates the benefit? Or is it society in general, which is as indefinite and indeterminate as the words themselves? Despite this ambiguity, we feel that the reference is to the person.

The Civil Code takes a firm stand on the use of human tissue. It does so in article 22, C.C.Q.: "A part of the body, whether an organ, tissue or other substance, removed from a person as part of the care he receives may, with his consent or that of the person qualified to give consent for him, be used for purposes of research." After rejecting the solution of "opting out," that is, of permitting use except where there is an express refusal, the National Assembly adopted that of "opting in," that is, of requiring consent. This approach, which is more respectful of the independence and inviolability of the person, suggests that a person has a certain right of ownership in his or her body. We have reservations about this interpretation. The characteristics of the civil law right of ownership do not permit a perfect analogy and suggest that caution is required. One fact remains, however: consent is necessary before research can be conducted on gametes or embryos.

Two questions come to mind: is the fetus included in the reference to human "tissue or other substance"? Who must consent? We would answer the first question as follows: since it does not have juridical personality, the fetus becomes "tissue" from the mother, or "produced by herself and the father." The use of ova removed from a woman for research purposes requires her consent. A man's consent is also required if his "tissue or other substance" is to be used for research purposes. The problem becomes complicated where an embryo is concerned: is it necessary to obtain the consent of the man and of the woman? We submit that it is, although our answer is speculative and refers to the controversy that arose in Daigle v. Tremblay. In fact, the National Assembly, which is sparing of explanations, has stated the principle; practice will determine how it is to be applied. Where there is a refusal, methods to ensure compliance with the decision expressed are limited. Assuming that it is possible, only an action for extra-contractual liability would provide compensation for the moral injury suffered. We will not consider the possibility of tissue or another substance being used without consent for commercial purposes, since this goes beyond the scope of our discussion. 12

Consent to the use of tissue or another substance must be given in writing; it may be revoked orally. The fact that articles 22 and 24, C.C.Q., use different terms raises a question. The first concerns the use of tissue for purposes of *research*; the second refers to *alienation* or an *experiment*. Is it necessary to give these expressions the same meaning? A strict textual interpretation suggests that this question should be answered in the negative. Respect for the person and for the human body provides an argument in favour of *written* consent, both for alienation and experiment

and for the use of human tissue for purposes of research. Moreover, such a requirement would permit a certain control over potential abuses. From the same point of view, we submit that the second paragraph of article 25, C.C.Q., which states that "An experiment may not give rise to any financial reward other than the payment of an indemnity as compensation for the loss and inconvenience suffered," applies to the use of tissue for research purposes.

A stricter analysis raises the distinction between alienation and experiment, on the one hand, and use of tissue for purposes of research, on the other. In the first case, consent would have to be *in writing*; in the second, oral consent will suffice. An absence of consideration remains a requirement in every case: the human body and its parts are not for sale. This approach looks simple in theory. In practice, however, the distinction between research and experiment may prove to be unclear. We therefore

prefer to apply the written consent rule strictly in every case.

The Civil Code of Quebec permits NRTs, with the exception of gestation and procreation agreements, if they are characterized as treatments for infertility. Such care, administered with the consent of persons of full age who are capable of giving their consent, is sometimes experimental in nature. The use of human tissue and other substances for purposes of research is also permitted with a person's consent. These provisions do not accord the fetus any specific protection, as it does not enjoy civil personality. Experiments on gametes and embryos are neither prohibited nor expressly authorized: a broad interpretation of article 22, C.C.Q., suggests that a first attempt is being made to regulate this matter. Gametes that are removed when a person is receiving care may, with the written consent of the donors, be used in research without payment.

## **Filiation**

The National Assembly chose to include NRTs or medically assisted procreation under family law, and more specifically under the law of filiation. We will look briefly at proof of filiation before considering how medically assisted procreation fits into this structure.  $^{13}$ 

## **Rules of Proof**

Four modes of proof may be used to establish filiation by blood. These are by document (act of birth), possession of status, presumption of paternity, and voluntary acknowledgment. Filiation may also result from an adoption judgment. All children whose filiation is established have the same rights and obligations, regardless of the circumstances of their birth. The civil law abolished the distinction between legitimate and illegitimate filiation several years ago.

The problem that divides jurists concerns the hierarchy of proof. Must the enumeration ordered by the legislature be observed, or may the presumption be given priority where there is a marriage? One school of thought maintains that the legislature does not speak for no purpose: if proof by document is first on the list, it is the preferred mode. Thus, a married mother's lover who signs the act of birth will have priority over her husband as the child's father. The second school of thought believes that the legislature did not intend to change the rules in the old Civil Code of Lower Canada, and that in marriage the husband is presumed to be the child's father. This interpretation favours the presumption despite the fact that it is in third place on the list. Nor does the case law clarify the situation, as the courts will adopt one theory or the other, depending on the evidence adduced. Both theories are invoked by counsel arguing in favour of the best interests of the child or of the parent bringing the action. A recent decision admits that, even if the child has to be placed in an economically disadvantageous position, emotional bonds are decisive in establishing the legal relationship of filiation.<sup>14</sup> This question is still being debated among legal experts.15

Where there is no act of birth, possession of status will prove filiation. Article 524, C.C.Q., describes the situation as follows: "Uninterrupted possession of status is established by an adequate combination of facts which indicate the relationship of filiation between the child and the persons of whom he is said to be born." It is necessary to gather as many facts, elements of behaviour, and displays of affection as possible to show that the persons in question, especially the man, are the child's parents. <sup>16</sup> Maternity based on childbirth, which is tangible evidence that is difficult to refute, is rarely, if ever, contested.

Concerning the fourth mode of proof, namely voluntary acknowledgment, the commentators are unanimous: it occupies the last place on the list. Acknowledgment will have a legal effect on filiation only if none of the other modes of proof applies.

The Civil Code of Quebec provides that filiation may be contested in actions relating to status. Such actions have a dual nature, and they may be brought only under certain conditions. Where the act of birth is inconsistent with the possession of status, an existing filiation may be contested or another filiation claimed. The father and mother have one year in which to disavow the child or contest the presumption of paternity. Any person may contest the child's filiation if the inconsistency mentioned above is proven. The child is subject to this condition if he or she wishes to claim another filiation. He or she must first contest the existing filiation.

Proof of filiation may be made by any mode. This is true when the objective is to disprove the husband's paternity, in which case testimony is admissible. When status is being contested or claimed, testimony is subject to the rule of the commencement of proof in writing resulting from family documents, domestic records, or any other writings. Every mode of proof is acceptable to contest an action concerning filiation. Although it

favours consistency between the biological and legal realities, the legislature has nevertheless protected the established filiation. It is more difficult to contest filiation, whereas any mode of proof may be used to defend it.

## **Medically Assisted Procreation**

Medically assisted procreation lies within the scope of the problems of proof of filiation. Quebec law recognizes and accepts "participation in the parental project of another person by way of a contribution of genetic material" (article 538, C.C.Q.). Although it neither says what the parental project is nor defines a "contribution of genetic material," the Code nevertheless provides that such participation does not create "any bond of filiation between the contributor and the child born of that procreation." The participation must be gratuitous, since it involves a product of the human body. The donor, who is the genetic parent, does not, in respect of the unborn child, have any of the obligations resulting from the parental relationship. He gives no guarantee and assumes no responsibility.

Although the contribution of genetic material does not create a bond of filiation, a child born of medically assisted procreation must be given a filiation. Article 539, C.C.Q., ensures this by providing that an action for contestation of status that is based exclusively on the use of this technology is inadmissible. A husband who did not consent to medically assisted procreation retains his action for disavowal. It is advisable for a married woman to obtain her husband's consent so that the unborn child benefits from the presumption. Fertility clinics require such consent as a precaution. No matter how stable the relationship, a *de facto* spouse must acknowledge the child by signing the act of birth.

A person who consents to medically assisted procreation is responsible to the child and to the mother of the child. The legislature has in this way emphasized the seriousness of the procedure and, as a consequence, penalizes consent given for the sake of convenience. Concerned with protecting unborn children, and with their best interests at heart, the law ensures that they have fathers. Consent to medically assisted procreation results in acknowledgment of filiation and acceptance of the resulting obligations.

The problem of confidentiality remains. The protection of anonymity, which was raised with respect to adoption over 10 years ago, has led to heated debate. Some maintain that the real family is the legal nuclear family; according to them, the past should be forgotten and genetic links ignored. Others advocate the greatest possible openness and point to the harmful effects of secrecy. The best interests of the child support both contentions, and the legislature has opted for compromise.

The Code first proclaims the principle of confidentiality: "Nominative information relating to the medically assisted procreation of a child is confidential" (article 542). This is an application of a person's right to the

respect of his or her reputation and privacy: "No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law" (article 35, C.C.Q., second paragraph).

There is one exception based on humanitarian considerations. The legislature has made provision for the veil of secrecy to be lifted under certain conditions. Only where serious injury could be caused to the person's health will he or she be allowed to research the family history. The ease with which the veil will be lifted depends on the interpretation given to this condition. Precedents related to adoption will help clarify what this provision means. Those precedents suggest that "health" includes physical and psychological health.<sup>17</sup> In theory, a mere whim will not justify such research. In practical terms, a whim may become an obsession that is harmful to a person's psychological health and cause serious injury. To this objection, advocates of "biological reality" reply that every person has the fundamental right to know his or her origins. A person still has to have suspicions about his or her origins, however, as parents are under no obligation, and physicians even less so, to disclose to a child that he or she was born of a parental project involving the participation of a third party. In theory, the confidentiality of medical records ensures that the child will remain unaware of his or her origins. Taking a position against other theories, the National Assembly refused to interfere to such an extent in family relationships. As in the case of adoption, it leaves the parents with total discretion.

The court allows access to information. Jurisdiction and procedure have yet to be determined. However, intervention by the court is an indication of the exceptional nature of the lifting of the veil of secrecy.

There is a further restriction related to the information and to the manner in which it is transmitted. Nominative information is excluded. The court may authorize the transmission of medical information if ignorance thereof could be the cause of serious injury to health. The Code provides that the information is to be transmitted "to the medical authorities concerned" (article 542, C.C.Q., second paragraph). This causes a problem. Let us consider the case of a person born of medically assisted procreation whose lack of knowledge of his or her origins disturbs his or her psychological well-being to such an extent that it could be the cause of serious injury to the person's health. Can the person obtain the information? A reading of the provision suggests a negative answer, since the requested information would be nominative and would be transmitted to the person rather than to the medical authorities concerned.

Who may apply to the court? In whose favour does the exception apply? A person born of medically assisted procreation benefits therefrom, on his or her own behalf or that of his or her descendants, if not knowing could be the cause of serious injury to the person's health or that of his or her descendants. The person's descendants may avail themselves of this right to protect their health or that of a close relative. The legislature used the word "right." It is not an absolute and universal right but a relative

right subject to the restrictions noted earlier. It is not reciprocal: those who have participated in the parental project of another person by donating gametes cannot carry out this search, regardless of the state of their health or that of a relative.

Given the nullity of gestation agreements, which we noted earlier, we have now examined the provisions of Quebec's civil law concerning NRTs. We will briefly summarize the civil law on these questions:

- 1. Participation in the parental project of another person is permitted, with the exception of procreation and gestation contracts.
- 2. Procreation and gestation agreements are absolutely null.
- 3. The National Assembly did not reach a decision concerning the legal status of the fetus and its protection.
- 4. The human body is not for sale, but donations of gametes by a person capable of giving consent are permitted under the following conditions:
  - (a) it must be gratuitous;
  - (b) consent must be confirmed in writing; and
  - (c) the donation must not involve risks that outweigh the expected benefits.
- 5. The National Assembly has not contemplated specific types of liability for gamete donors and persons applying NRTs. The rules of the *jus commune* apply.
- 6. Human tissue and other substances may be used for research purposes with the consent of the person from whom they were removed.
- 7. Medically assisted procreation does not create a bond of filiation with the gamete donor.
- 8. Actions concerning status, namely those that contest filiation, are prohibited if the only ground invoked concerns medically assisted procreation.
- 9. A person consenting to medically assisted procreation, whether the husband or a *de facto* spouse, is responsible to the mother and the child.
- 10. Confidentiality is the rule. However, some information may be transmitted to the medical authorities concerned for humanitarian reasons.

Although some provisions of the Quebec legislation are at the cutting edge, it is nevertheless only a beginning. The legislature deserves praise for

having taken positions on certain sensitive and controversial aspects of NRTs.

## Reflections on the Questions Raised by the Commission

Quebec's civil law does not always give direct answers to the questions raised by the Commission. <sup>18</sup> We therefore consider it appropriate to make comments on some of them.

## The Right to Be a Parent

If such a right exists, it does not receive official recognition in the Code. The legislation gracefully evades this difficult question by referring to the "parental project of another person." The provisions concerning care and treatment, which apply to medically assisted procreation, regard it as a remedy for sterility. For the National Assembly, procreation is a medical question. The subject extends beyond this context, but, given the scope of the legal and ethical questions raised by these technologies, the discussion has only just begun.

Whether it constitutes treatment or care, medically assisted procreation indirectly raises the question of the right to be a parent. Universality of the health insurance system implies that every person is entitled to the care dictated by the state of his or her health.<sup>19</sup> If this principle is applied strictly, it includes an obligation to provide any person who wants a child with the technological and medical means to have a child. The reality is different; scientific protocols and medical indications and guidelines govern the provision of these relatively limited services. If the National Assembly chooses not to deal directly with the right to be a parent in the Civil Code, it will be forced to do so in the near future when it allocates resources that are becoming increasingly scarce every day.

The Civil Code raises questions that have not yet been answered. The legislature has noted the effects and consequences of status as a parent, which might at best be called a privilege. This "privilege" entails rights, but above all obligations, which should have been defined and explained.

## Legal Status of Those Involved

Elements of an answer have been presented in the preceding sections. We will now summarize the impending Quebec law on this subject.

Since procreation and gestation agreements are null, the parties have no judicial recourse to enforce the obligations arising therefrom. Voluntary performance is not subject to legal or judicial review. To regularize the status, in relation to the "social" parents, of a child born as a result of such a contract implies, at the very least, if not fraudulent activity, a great deal of initiative and imagination.

The validity of the other technologies is recognized; however, the Civil Code of Quebec excludes the bond of filiation between gamete donors and children born as a result of such donations. The children will be identified with the couple benefiting from a new technology; they will be the brothers and sisters of any children already in the family or added to the family in the future. The bond of filiation so created is identical to that established by biological filiation. The consequences in respect of support and succession will be the same.

The liability of donors and all other parties involved is subject to the usual rules of the civil law. Prudence and care are necessary. Nobody is required to provide guarantees. Liability based on proven fault is the norm. Suggestions that strict liability apply in this sphere have been rejected. Fertility clinics devise their own tests for selecting donors, which are of course based on medical histories and testing. These standards are not uniform, and "safety" may vary from one centre to another.

#### Informed Consent

Medically assisted procreation, like any care or treatment, requires "informed consent"; it must satisfy the usual tests in this area. The Supreme Court of Canada showed the way in  $Hopp\ v.\ Lepp^{20}$  and  $Reibl\ v.\ Hughes.^{21}$  Judicial decisions in Quebec have added a few refinements.  $^{22}$  The physician's duty to provide information is expanded in the case of elective care. He or she must disclose all the information and all the risks. Medically assisted procreation requires complete information, including information on probable, possible, and potential risks, and on the success rate, psychological effects, and consequences of the procedure.

Must the physician also mention alternatives? The answer is less clear. The physician's duty is limited to medical reproductive technologies. Options from outside this field, such as adoption, may be ignored. It is nevertheless possible to hope that a serious medical team would include these possibilities in the information it provides.

The legislature has made a choice concerning the medicalization of procreation. The Civil Code of Quebec refers to *medically* assisted procreation. The Conseil du statut de la femme sees a danger of exploitation of the bodies of women in a way that would dehumanize a natural process. These arguments, which are certainly valid, continue to fuel a debate that is not over yet.

The role of the media should also be noted. The messages they convey are often contradictory and hard to decipher. Some praise the advances of a scientific field that is evolving with extreme rapidity and paint an enticing picture of astonishing and unexpected possibilities. Others take a pessimistic view and liken these technologies purely and simply to experiments in which women are the guinea pigs and the unborn children are the victims. The scientific debate is more subtle, but receives little

publicity. This non-legal perspective raises a doubt as to the quality of the information available to "consumers" of the new technologies.

## Confidentiality

Absolute confidentiality is the rule. Released from any bond of filiation, the privacy of donors is safe. There is an exception in respect of nominative information, which permits the transmission of medical information between medical authorities. According to our interpretation, it is impossible for the child to know his or her biological parents. In this regard, the rule is more restrictive than that applied to adoption. Parents are under no obligation to disclose to the child that he or she was born of a reproductive technology.

To evaluate the effects of this standard on the child goes beyond the scope of this paper. Inspired by a desire to protect the children, the legislation shields them from the donors' indiscretions, remorse, or future needs. The child's health and welfare are ensured by the possibility of tracking down certain information. It is doubtful that a child can find his or her genetic parents to ensure his or her psychological well-being.

The National Assembly has not prescribed standards for record keeping on donors. Health institutions develop their own access to information systems and guarantee confidentiality. But is there a single perfectly water-tight system? We doubt it.

## **Ownership of Gametes and Embryos**

The civil law adheres to the principle that the human body is not for sale. As a result, it has refrained from ruling on "ownership" of the body or of parts thereof. It permits organ donations and prescribes conditions therefor. Organs, tissue, and other substances removed when care is given may be used for research if the person consents. The fate of surplus or "orphan" embryos remains vague and uncertain. Solutions based on foreign decisions can be imagined. If the person has to consent to the donation and use of his or her cells, he or she can no doubt request that they be destroyed. However, the embryo does not belong to the person. Although Quebec law has displayed a certain boldness in legislating on medically assisted procreation, it has remained silent on these questions.

## Conclusion

The National Assembly enacts provisions on medically assisted procreation; it amends the law of contracts and of filiation. Fundamental rights and the right to health care provide possible solutions. As a vision of society, the Civil Code indicates a direction and reflects a consensus.

The Civil Code of Quebec raises several questions and suggests some answers. It is time for reflection and consultation. There are risks to the new technologies, and the stakes are high. They are of concern to all Canadians. The Civil Code is breaking new ground. The reform has shown how hard it is to legislate on these questions, which raise passions and lead to ideological conflict, but the matter is urgent and choices must be made. The future of our society depends on it.

## **Appendix: Extracts from the Civil Code of Quebec**

#### Bill 125

## Civil Code of Québec

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS: PRELIMINARY PROVISION

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

## **BOOK ONE**

#### **PERSONS**

#### TITLE ONE

#### ENJOYMENT AND EXERCISE OF CIVIL RIGHTS

- 1. Every human being possesses juridical personality and has the full enjoyment of civil rights.
  - 2. Every person has a patrimony.

The patrimony may be divided or appropriated to a purpose, but only to the extent provided by law.

**3.** Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

These rights are inalienable.

**4.** Every person is fully able to exercise his civil rights.

In certain cases, the law provides for representation or assistance.

- **5.** Every person exercises his civil rights under the name assigned to him and stated in his act of birth.
  - **6.** Every person is bound to exercise his civil rights in good faith.
- **7.** No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.
- **8.** No person may renounce the exercise of his civil rights, except to the extent consistent with public order.
- **9.** In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order.

#### TITLE TWO

#### CERTAIN PERSONALITY RIGHTS

#### CHAPTER I

#### INTEGRITY OF THE PERSON

**10.** Every person is inviolable and is entitled to the integrity of his person.

Except in cases provided for by law, no one may interfere with his person without his free and enlightened consent.

#### SECTION I

#### CARE

11. No person may be made to undergo care of any nature, whether for examination, specimen taking, removal of tissue, treatment or any other act, except with his consent.

If the person concerned is incapable of giving or refusing his consent to care, a person authorized by law or by mandate given in anticipation of his incapacity may do so in his place.

12. A person who gives his consent to or refuses care for another person is bound to act in the sole interest of that person, taking into account, as far as possible, any wishes the latter may have expressed.

If he gives his consent, he shall ensure that the care is beneficial notwithstanding the gravity and permanence of certain of its effects, that it is advisable in the circumstances and that the risks incurred are not disproportionate to the anticipated benefit.

13. Consent to medical care is not required in case of emergency if the life of the person is in danger or his integrity is threatened and his consent cannot be obtained in due time.

It is required, however, where the care is unusual or has become useless or where its consequences could be intolerable for the person.

14. Consent to care required by the state of health of a minor is given by the person having parental authority or by his tutor.

A minor fourteen years of age or over, however, may give his consent alone to such care. If his state requires that he remain in a health or social services establishment for over twelve hours, the person having parental authority or tutor shall be informed of that fact.

- 15. Where it is ascertained that a person of full age is incapable of giving his consent to care required by his state of health, consent is given by his mandatary, tutor or curator. If the person of full age is not so represented, consent is given by his spouse or, if he has no spouse or his spouse is prevented from giving consent, it is given by a close relative or a person who shows a special interest in the person of full age.
- 16. The authorization of the court is necessary where the person who may give consent to care required by the state of health of a minor or a person of full age who is incapable of giving his consent is prevented from doing so or, without justification, refuses to do so; it is also required where a person of full age who is incapable of giving his consent categorically refuses to receive care, except in the case of hygienic care or emergency.

The authorization of the court is necessary, furthermore, to cause a minor fourteen years of age or over to undergo care he refuses, except in the case of emergency if his life is in danger or his integrity threatened, in which case the consent of the person having parental authority or the tutor is sufficient.

- 17. A minor fourteen years of age or over may give his consent alone to care not required by the state of his health; however, the consent of the person having parental authority or of the tutor is required if the care entails a serious risk for the health of the minor and may cause him grave and permanent effects.
- 18. Where the person is under fourteen years of age or is incapable of giving his consent, consent to care not required by his state of health is given by the person having parental authority or the mandatary, tutor or curator; the authorization of the court is also necessary if the care entails a serious risk for health or if it might cause grave and permanent effects.
- **19.** A person of full age who is capable of giving his consent may alienate a part of his body *inter vivos*, provided the risk incurred is not disproportionate to the benefit that may reasonably be anticipated.

A minor or a person of full age who is incapable of giving his consent may, with the consent of the person having parental authority, mandatary, tutor or curator and with the authorization of the court, alienate a part of his body only if that part is capable of regeneration and provided that no serious risk to his health results.

- **20.** A person of full age who is capable of giving his consent may submit to an experiment provided that the risk incurred is not disproportionate to the benefit that can reasonably be anticipated.
- 21. A minor or a person of full age who is incapable of giving his consent may be submitted to an experiment only in the absence of serious risk to his health and of objection on his part, provided that he understands the nature and consequences of the act; the consent of the person having parental authority or of the mandatary, tutor or curator is required.

An experiment may be carried out on one person alone only if a benefit to the health of that person may be expected, and the authorization of the court is required.

An experiment on a group of minor persons or incapable persons of full age shall be carried out within the framework of a research project approved by the Minister of Health and Social Services, upon the advice of an ethics committee of the hospital designated by the Minister or of an ethics committee created by him for that purpose; in addition, such an experiment may be carried out only if a benefit to the health of persons of the same age group and having the same illness or handicap as the persons submitted to the experiment may be expected.

Care considered by the ethics committee of the hospital concerned to be innovative care required by the state of health of the person submitted to it is not an experiment.

- **22.** A part of the body, whether an organ, tissue or other substance, removed from a person as part of the care he receives may, with his consent or that of the person qualified to give consent for him, be used for purposes of research.
- **23.** When the court is called upon to rule on an application for authorization with respect to care, the alienation of a part of the body, or an experiment, it obtains the opinions of experts, of the person having parental authority, of the mandatary, of the tutor or the curator and of the tutorship council; it may also obtain the opinion of any person who shows a special interest in the person concerned by the application.

The court is also bound to obtain the opinion of the person concerned unless that is impossible, and to respect his refusal unless the care is required by his state of health.

**24.** Consent to care not required by a person's state of health, to the alienation of a part of a person's body, or to an experiment shall be given in writing.

It may be withdrawn at any time, even verbally.

**25.** The alienation by a person of a part or product of his body shall be gratuitous; it may not be repeated if it involves a risk to his health.

An experiment may not give rise to any financial reward other than the payment of an indemnity as compensation for the loss and inconvenience suffered.

#### CHAPTER III

#### RESPECT OF REPUTATION AND PRIVACY

**35.** Every person has a right to the respect of his reputation and privacy.

No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law.

#### TITLE TWO

#### FILIATION

#### GENERAL PROVISION

**522.** All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth.

#### CHAPTER I

#### FILIATION BY BLOOD

#### SECTION I

#### PROOF OF FILIATION

## $\S 1. - Title and possession of status$

**523.** Paternal filiation and maternal filiation are proved by the act of birth, regardless of the circumstances of the child's birth.

In the absence of an act of birth, uninterrupted possession of status is sufficient.

**524.** Uninterrupted possession of status is established by an adequate combination of facts which indicate the relationship of filiation between the child and the persons of whom he is said to be born.

## § 2. — Presumption of paternity

**525.** If a child is born during a marriage, or within three hundred days after the dissolution or annulment of the marriage, the husband of the child's mother is presumed to be the father.

The presumption of the husband's paternity is rebutted if the child is born more than three hundred days after the judgment ordering separation from bed and board, unless the spouses have voluntarily resumed living together before the birth.

If a child is born within three hundred days after the dissolution or annulment of a marriage but after his mother has remarried, her husband at the time of the birth is presumed to be the father of the child.

## § 3. — Voluntary acknowledgement

- **526.** If maternity or paternity cannot be determined by applying the preceding articles, the filiation of a child may also be established by voluntary acknowledgement.
- **527.** Maternity is acknowledged by a declaration made by a woman that she is the mother of the child.

Paternity is acknowledged by a declaration made by a man that he is the father of the child.

**528.** Mere acknowledgement of maternity or of paternity binds only the person who made it.

**529.** An established filiation which has not been successfully contested in court is not impugnable by a mere acknowledgement of maternity or of paternity.

#### SECTION II

#### ACTIONS RELATING TO FILIATION

**530.** No person may claim a filiation contrary to that assigned to him by his act of birth and the possession of status consistent with that act.

No person may contest the status of a person whose possession of status is consistent with his act of birth.

**531.** Any interested person, including the father or the mother, may, by any means, contest the filiation of a person whose possession of status is not consistent with his act of birth.

However, the presumed father may contest the filiation and disavow the child only within one year of the date on which the presumption of paternity takes effect, unless he is unaware of the birth, in which case the time limit begins to run on the day he becomes aware of it. The mother may contest the paternity of the presumed father within one year from the birth of the child.

**532.** A child whose filiation is not established by an act and by possession of status consistent therewith may claim his filiation before the court. Similarly, the father or the mother may claim paternity or maternity of a child whose filiation in their regard is not established by an act and by possession of status consistent therewith.

If the child already has another filiation established by an act of birth, by the possession of status, or by the effect of a presumption of paternity, an action to claim status may not be brought unless it is joined to an action contesting the status thus established.

The action for disavowal or for contestation of status is directed against the child and against the mother or the presumed father, as the case may be.

**533.** Proof of filiation may be made by any mode of proof. However, testimony is not admissible unless there is a commencement of

proof, or unless the presumptions or indications resulting from already clearly established facts are sufficiently strong to permit its admission.

- **534.** Commencement of proof results from the family documents, domestic records and papers, and all other public or private writings proceeding from a party engaged in the contestation or who would have an interest therein if he were alive.
- **535.** Every mode of proof is admissible to contest an action concerning filiation.

Any mode of proof tending to establish that the husband is not the father of the child is also admissible.

**536.** In all cases where the law does not impose a shorter period, actions concerning filiation are prescribed by thirty years from the day the child is deprived of the claimed status or begins to enjoy the contested status.

If a child has died without having claimed his status but while he was still within the time limit to do so, his heirs may take action within three years of his death.

**537.** The death of the presumed father or of the mother before the expiry of the period for disavowal or for contestation of status does not extinguish the right of action.

The heirs may exercise this right, however, only within one year after the death.

#### SECTION III

#### MEDICALLY ASSISTED PROCREATION

- **538.** Participation in the parental project of another person by way of a contribution of genetic material to medically assisted procreation does not allow the creation of any bond of filiation between the contributor and the child born of that procreation.
- **539.** No person may contest the filiation of a child on grounds relating to his medically assisted procreation, and no claim to another status is admissible from the child.

However, the husband of the mother may disavow the child or contest acknowledgement if he did not give consent to medically assisted procreation or if he proves that the child was not born of such procreation.

- **540.** A person who, after consenting to medically assisted procreation, does not acknowledge the child born of such procreation is responsible to the child and to the mother of the child.
- **541.** Procreation or gestation agreements on behalf of another person are absolutely null.
- **542.** Nominative information relating to the medically assisted procreation of a child is confidential.

However, where serious injury could be caused to the health of a person born of such procreation or of any of his descendants if he were deprived of the information he requires, the court may allow such information to be transmitted confidentially to the medical authorities concerned. A descendant of such a person may also avail himself of this right if the fact that he is deprived of the information he requires could be the cause of serious injury to his health or the health of any of his close relatives.

## BOOK FIVE OBLIGATIONS

## TITLE ONE OBLIGATIONS IN GENERAL

## CHAPTER I

#### **GENERAL PROVISIONS**

**1371.** It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence.

**1372.** An obligation arises from a contract or from any act or fact to which the effects of an obligation are attached by law.

An obligation may be pure and simple or subject to modalities.

**1373.** The object of an obligation is the prestation that the debtor is bound to render to the creditor and which consists in doing or not doing something.

The debtor is bound to render a prestation that is possible and determinate or determinable and that is neither forbidden by law nor contrary to public order.

**1374.** The prestation may relate to any property, even future property, provided that the property is determinate as to kind and determinable as to quantity.

**1375.** The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

**1376.** The rules set forth in this Book apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them.

## CHAPTER II CONTRACTS

#### SECTION I

#### GENERAL PROVISION

**1377.** The general rules set out in this chapter apply to all contracts, regardless of their nature.

Special rules for certain contracts which complement or depart from these general rules are established under Title Two of this Book.

#### SECTION II

#### NATURE AND CERTAIN CLASSES OF CONTRACTS

**1378.** A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.

Contracts may be divided into contracts of adhesion and contracts by mutual agreement, synallagmatic and unilateral contracts, onerous and gratuitous contracts, commutative and aleatory contracts, and contracts of instantaneous performance or of successive performance; they may also be consumer contracts.

**1379.** A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable.

Any contract that is not a contract of adhesion is a contract by mutual agreement.

**1380.** A contract is synallagmatic, or bilateral, when the parties obligate themselves reciprocally, each to the other, so that the obligation of one party is correlative to the obligation of the other.

When one party obligates himself to the other without any obligation on the part of the latter, the contract is unilateral.

**1381.** A contract is onerous when each party obtains an advantage in return for his obligation.

When one party obligates himself to the other for the benefit of the latter without obtaining any advantage in return, the contract is gratuitous.

**1382.** A contract is commutative when, at the time it is formed, the extent of the obligations of the parties and of the advantages obtained by them in return is certain and determinate.

When the extent of the obligations or of the advantages is uncertain, the contract is aleatory.

**1383.** Where the circumstances do not preclude the performance of the obligations of the parties at one single time, the contract is a contract of instantaneous performance.

Where the circumstances absolutely require that the obligations be performed at several different times or without interruption, the contract is a contract of successive performance.

**1384.** A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.

#### SECTION III

#### FORMATION OF CONTRACTS

## § 1. — Conditions of formation of contracts

### I — General provision

**1385.** A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties require the contract to take the form of a solemn agreement.

It is also of the essence of a contract that it have a cause and an object.

#### II - Consent

## 1. Exchange of consents

**1386.** The exchange of consents is accomplished by the express or tacit manifestation of the will of a person to accept an offer to contract made to him by another person.

## V — Object of contracts

**1412.** The object of a contract is the juridical operation envisaged by the parties at the time of its formation, as it emerges from all the rights and obligations created by the contract.

## CHAPTER III CIVIL LIABILITY

#### SECTION I

#### CONDITIONS OF LIABILITY

### § 1. — General provisions

**1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

**1458.** Every person has a duty to honour his contractual undertakings.

Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is liable to reparation for the injury; neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favourable to them.

## **Abbreviations**

C.A.

	O
Cal. App.	California Appeals Court
Cal. Rptr.	California Reporter
C.C.L.C.	Civil Code of Lower Canada
C.C.Q.	Civil Code of Quebec
C.Q.Y.D.	Court of Quebec, Youth Division
C.S.	Cour supérieure du Québec
R.J.Q.	Recueil de jurisprudence du Québec
S.C.R.	Supreme Court Reports
S.Q.	Statutes of Quebec
Sup. Ct.	Quebec Superior Court

Quebec Court of Appeal

### **Notes**

N.B.: This document was written before Working Paper No. 65, Medically Assisted Procreation, was issued by the Law Reform Commission of Canada in May 1992.

In order to make this text less cumbersome and easier to read, articles of the Civil Code of Quebec are referred to only in exceptional cases. The relevant provisions are reproduced in the Appendix.

- 1. This expression was used frequently in the National Assembly committee by Gil Rémillard, the Minister of Justice, and by a member of the Opposition, Louise Harel. The "society" referred to is Quebec, which is the only province with a civil code.
- 2. A document issued by the Commission entitled "A Guide to Public Participation in the Work of the Royal Commission on New Reproductive Technologies," June 1991, pp. 10 and 11.
- 3. Article 1371 et seg., C.C.Q.
- 4. Article 1378, C.C.Q., first paragraph.
- 5. Report of the committee on new reproductive technologies of the Barreau du Québec, April 1988, in *Revue du Barreau* 48 (Suppl.) (June 1988), 39 (translation).
- 6. See the briefs submitted to the National Assembly committee in the fall of 1991 concerning the enactment of Bill 125, which, when assented to, became the Civil Code of Quebec.
- 7. See, inter alia, articles 32 to 34, C.C.Q.
- 8. See *Tremblay v. Datgle*, [1989] R.J.Q. 1980 (Sup. Ct.); [1989] R.J.Q. 1735 (C.A.); [1989] 2 S.C.R. 530.
- 9. R.P. Kouri, "Réflexions sur le statut juridique du fœtus," *Revue juridique Thémis* 15 (1980-81): 193-200.
- 10. É. Deleury, "Naissance et mort de la personne humaine, ou les confrontations de la médecine et du droit," *Cahiers de Droit* 17 (1976): 265-316.
- 11. The courts nevertheless hear claims in civil liability for compensation for injury suffered *in utero*, provided that fault and a cause-and-effect relationship can be proven.
- 12. Moore v. Regents of the University of California, 249 Cal. Rptr. 494 (Cal. App. 2 Dist. 1988).
- 13. The subject is dealt with in articles 522 to 542, C.C.Q.
- 14. Drott de la famille 989, [1991] R.J.Q. 1343 (Sup. Ct.).
- 15. For example, the following authors have expressed opinions on the issue: J. Pineau, La famille: droit applicable au lendemain de la "loi 89" (Montreal: Presses de l'Université de Montréal, 1982), pp. 198 et seq.; J.-P. Senécal, Droit de la famille québécois (Farnham: CCH/FM, 1991), No. P. 50-065, pp. 4,006 et seq.; M. Ouellette, Droit de la famille, 2d ed. (Montreal: Thémis, 1991), pp. 62 et seq.
- 16. Drott de la famille 737, [1990] R.J.Q. 85 (C.A.).
- 17. To illustrate this point, the following decisions may be consulted: *Droit de la famille 657*, [1989] R.J.Q. 1693 (C.Q.Y.D.); *Droit de la famille 797*, [1990] R.J.Q. 1184 (C.Q.Y.D.).

- 18. "A Guide to Public Participation in the Work of the Royal Commission on New Reproductive Technologies," June 1991, pp. 10-12.
- 19. Section 5 of the Act respecting health services and social services and amending various legislation, S.Q. 1991, c. 42, reads as follows:

Every person is entitled to receive, with continuity and in a personalized manner, health services and social services which are scientifically, humanly and socially appropriate.

- 20. Hopp v. Lepp, [1980] 2 S.C.R. 192.
- 21. Reibl v. Hughes, [1980] 2 S.C.R. 880.
- 22. By way of illustration, see *Boyer v. Grignon*, [1988] R.J.Q. 829 (Sup. Ct.); *Dulude v. Gaudette*, [1974] C.S. 618; *Chouinard v. Landry*, [1987] R.J.Q. 1954 (C.A.). Works by legal authors and judicial decisions are numerous. Since our study is not concerned with this subject, it did not seem relevant to refer to them.

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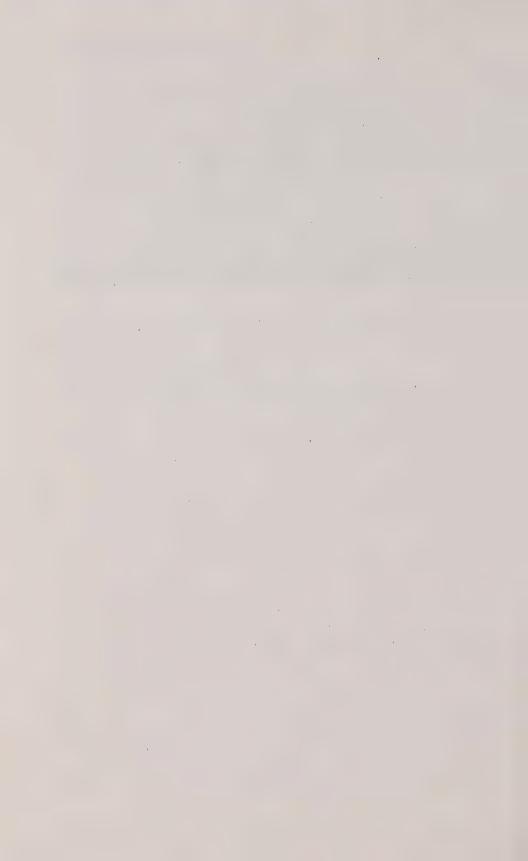
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# New Reproductive Technologies: International Legal Issues and Instruments

Rebecca J. Cook



### **Executive Summary**

The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women all contain certain principles that Canada, as a party to these treaties, is obligated to respect. This paper identifies those substantive rights that may be applicable to the area of new reproductive technologies, and suggests avenues for research to determine their implications for what legislatures may do within the terms and spirit of the conventions by which Canada is bound.

The right to life; right to liberty and security of the person; right to marry and found a family; right to private and family life; rights to information and education; right to reproductive health and health care; right to the benefits of scientific progress; and right to sexual non-discrimination may all have relevance to the field of new reproductive technologies. For instance, the right to liberty and security of the person, if interpreted as a positive right, could give individuals legal claims that government-funded health services must take due account of the incidence of infertility and of individuals' dependence on government action to realize their liberty interests in having children.

This paper was completed for the Royal Commission on New Reproductive Technologies in October 1991 and released in December 1991.

Similarly, the right to have a family could be interpreted as a positive right that would require governments to provide services for infertile persons. The right to information, and specifically information about family planning, may include a positive component of planning a family with the assistance of a new reproductive technology.

The definition of discrimination against women, contained in the Convention on the Elimination of All Forms of Discrimination Against Women, transcends other human rights, including, for instance, the right to found a family. While this is most often phrased in the context of birth control, it may apply no less to birth facilitation. The Royal Commission may undertake research to review in a comprehensive way what forms of distinctions may constitute unlawful discrimination on grounds of sex. Alternatively, research could be postponed until the Commission formulates tentative recommendations, which could then be reviewed to determine whether any appear to offend international human rights provisions on sexual non-discrimination.

While there are few legally enforceable means of seeking international remedies should these principles be contravened, there is considerable political weight attached to decisions of international tribunals and the obligation to report to international committees on compliance with the principles contained in international agreements to which Canada is a party.

## Introduction

The modern era of international human rights law can be said to have begun in 1945 with the adoption of the Charter of the United Nations. The Charter established the role of the United Nations in furthering international human rights and opened the door for the United Nations General Assembly to adopt the Universal Declaration of Human Rights in 1948. This Declaration was given legal force through two general international covenants and an increasing number of specialized international conventions. The two general covenants are the International Covenant on Civil and Political Rights (Political Covenant) and the International Covenant on Economic, Social and Cultural Rights (Economic Covenant). Prominent among the specialized conventions is the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention).

Canada was a founding member of the United Nations and an early and enthusiastic full participant in the leading international human rights covenants founded on the Universal Declaration of Human Rights. Language from these international instruments shaped the *Canadian Charter of Rights and Freedoms*.\(^1\) In a significant sense, the legal effect of the Charter is to meet Canada's international obligations to give effect in its domestic law to its international undertakings. It has been observed that "the Charter then becomes a bridge between municipal and international law to a degree, and with an intensity, not heretofore known in any of the

multitude of links between the Canadian and international legal orders."<sup>2</sup> Accordingly, the application of the Charter by Canadian courts, and in particular by the Supreme Court of Canada, can be expected to give force to the human rights and government obligations and restraints embodied in the international human rights conventions that Canada has ratified. This is an area where Canadian Charter interpretation will extend beyond the influence of the constitutional practice of the United States, since the United States has not ratified the leading international human rights conventions.

The terms of reference of the Royal Commission on New Reproductive Technologies touch on key principles of international human rights law at many points. Any recommendations that the Commissioners make as a result of their studies and deliberations should be informed by their location within the network of individual rights and governmental obligations contained in the leading international human rights conventions. This paper identifies such rights and indicates where research is required to explicate the details of these rights and their implications for what legislatures may do within the terms and the spirit of the conventions by which Canada is bound. Further, research should address how Canadian courts have responded and, under the regime of the Charter, are likely to respond to the application in domestic law of legal obligations Canada has assumed under international law.

The authority that binds Canada internationally is that of the federal government. Under the Constitution Act, 1867, many of the legislative powers affecting new reproductive technologies are in the hands of the provincial and territorial governments, which are not legally obliged to give effect to commitments assumed internationally by the federal government. To reduce the potential for conflict, machinery has evolved by which the federal government seeks approval from provincial and territorial governments before ratifying new international human rights conventions. Legal conflict in interpreting provincial and territorial legislation is further reduced because such legislation is subject to the Charter, which is likely to be interpreted compatibly with the international human rights obligations Canada has assumed. The area of federal-provincial-territorial response to such conventions in domestic law warrants some attention by the Royal Commission in fashioning its recommendations.

This paper is directed to the dominant international human rights conventions relevant to new reproductive technologies, namely the Political and Economic Covenants and the Women's Convention.<sup>3</sup> Research to which this paper may give rise will identify several related conventions including, for instance, the recently adopted Convention on the Rights of the Child.

## **Substantive Rights**

## Right to Life

In international terms, maternal mortality rates in Canada are relatively low, although no effort should be spared to reduce them further. Among disadvantaged populations, however, rates remain unacceptably high. Maternal mortality and pregnancy-related morbidity that threatens life are associated with pregnancies that come too early, too late, too frequently, or too closely spaced in women's reproductive lives. Control of unwanted pregnancy and effective birth spacing depend on effective contraception. Research to facilitate more effective promotion of reproductive health, including safer and more effective contraception, is underfunded and obstructed in many ways. Contraceptive research is associated with research on fertilization and implantation of pre-embryos in utero.

The Royal Commission's consideration of research on gametes, preembryos, and embryos should be sensitive to the potential impact of its recommendations on women's contraceptive choices, because these relate to women's right to life under international human rights conventions.

Article 6.1 of the Political Covenant provides that "[e]very human being has the inherent right to life. This right shall be protected by law." Decisions to date by international human rights tribunals have been based on a narrow interpretation of Article 6.1. Nevertheless, the Human Rights Committee established under the Political Covenant has observed that "the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot be properly understood in a restrictive manner, and the protection of this right requires that States adopt positive measures." We can therefore speculate that the right to life will come to be seen and applied to broader effect. How far such a tendency may go warrants attention in the context of recent Canadian law developed by the Supreme Court of Canada.

In international human rights jurisprudence, the right to life has never been applied before live birth. Indeed, a number of leading international human rights tribunals have expressly held that the unborn have no right to life in cases in which national legislation permitting abortion has been challenged. Separate from the right to life before birth, however, is the right of the state to protect its own interest in unborn human life. In the Morgentaler case, all judges recognized that the state may lawfully exercise an influence in favour of continuation of pregnancy at some point toward the latter part of gestation. Accordingly, the Royal Commission should take account of the potential in Canadian law to restrict abortion compatibly with the evolving rights of women and of fetuses under principles of international human rights law.

### Right to Liberty and Security of the Person

Article 9.1 of the Political Covenant provides that

[e]veryone has the right to liberty and security of person ... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Jointly with the right to life, this provision is expressed directly in the Canadian Charter of Rights and Freedoms. In the Morgentaler case, a majority of the Supreme Court struck down restrictive abortion legislation because it violated the right to liberty and, particularly, the right to security of the person.

In international human rights jurisprudence, the right to liberty and security tends to be seen as a negative right. That is, it is a right to noninterference by government in the exercise of personal choice. The right is relevant to individuals' resort to new reproductive technologies and to legislative restrictions on access. The right may evolve, however, to become a positive right, affording individuals a right to government assistance in pursuit not only of security but also of liberty. Currently, individual recourse to a new reproductive technology would appear to be a liberty interest rather than a security interest, because personal security is not endangered by a natural inability to conceive. It may be otherwise, however, where women in infertile relationships are vulnerable to divorce, abandonment, or comparable disadvantage endangering their health or other security. If the right to liberty and security develops into a positive right, individuals may acquire legal claims that government-funded health services must take due account of the incidence of infertility and of individuals' dependence on government action to realize their liberty interest in having children. Such a claim would have special force in Canada, where the Canada Health Act requires provincial health insurance programs to provide comprehensive health services.

Research should identify the imminence of a legal transition of the right to liberty and security from a negative to a positive right, and the willingness of Canadian courts to apply Charter or other provisions of law to require governments to service positively individuals' legal rights to pursue reproductive choices. Further, the extent to which Canadian legislation can limit individuals' access to private infertility clinics warrants study, as does potential regulation of direct involvement in surrogate motherhood and its mediation.

### Right to Marry and Found a Family

Article 23.2 of the Political Covenant states that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized." This provision reflects Article 16.1 of the Universal Declaration, which originated in a reaction to the Nazi racial and reproductive policies that culminated in genocide. A matter of legal concern is whether

marriage is a legal precondition to the right to found a family. The human rights codes of some Canadian provinces prohibit discrimination on grounds of marital status, and such discrimination may be found unlawful as one of the unenumerated grounds of discrimination under section 15.1 of the Charter. Further, the reference to marriageable age raises questions of discrimination on grounds of age. These matters warrant research in Charter jurisprudence.

There is international human rights jurisprudence on the rights of single parents to enjoy family life, raising questions about legally permissible criteria for admission to assisted reproduction programs in Canada. The right to found a family is a negative right in that governments are precluded from intervening in the plans and behaviour of those who are able to found families without assistance, subject to permissible limits on grounds of young age, incest, and, for instance, mental capacity. The right may also have positive aspects, however, that would require governments to provide services for infertile persons, on the basis of either the right itself or the prohibition on denying health services to people with disabilities, including those with reproductive impairments. Where provincial health plans cover, for instance, microsurgical reconstruction of damaged or diseased fallopian tubes or tubal transplantation, the refusal to cover in vitro fertilization may be challenged as discrimination on grounds of medical disability or on grounds of marital status where such microsurgery is available without regard to marriage status.

Founding a family may clearly implicate reproductive technologies, but it also includes reproduction not dependent on medical technology, such as surrogate motherhood arrangements that may be initiated by simple means, including condoned adultery. Does a couple have a legally protected human right to resort to third-party collaboration in this way? Does a third party have a reciprocal right to collaborate in founding the family of a couple of which she is not a partner? These questions are greater variants of more minor but considerably more common questions concerning the rights of infertile people to found their families through donated gametes or pre-embryos, and the rights of individuals to donate gametes and pre-embryos to assist the foundation of families by others. Accordingly, research should be undertaken on the international human rights powers and limitations relevant to gaining access to assisted reproduction and to giving assistance on both an unpaid and a commercial basis.

### Right to Private and Family Life

Canadian courts have deliberately held open the question of whether there exists in Canadian law a right to privacy comparable to that recognized in the United States, where restrictive legislation on abortion and contraception has been held unconstitutional for violating the right to privacy.<sup>7</sup> The Political Covenant provides in Article 17 that "[n]o one shall

be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence ..." and that everyone enjoys "the right to the protection of the law against such interference."

Research should be undertaken to distinguish lawful from unlawful state interference with reproductive privacy. Research should also determine to what extent provincial legislation regulating reproductive technologies would be lawful or is a denial of the protection of the law guaranteed under international human rights conventions.

The right to private and family life is distinguishable from the right to found a family, although for some purposes the latter right may be considered to be part of the former. The right to private life may include the right to avoid pregnancy and, within the limits indicated in the Morgentaler decision, to terminate pregnancy, but from its origins in the Universal Declaration of Human Rights and the Political Covenant, the right to private life has been hedged by words of limitation that accommodate compromises of the right in favour of state interests. Nevertheless, the human rights guarantee that privacy enjoys the protection of law against interference puts signatory states on notice that they must be able to present compelling reasons for asserting their interests over individuals' claims to privacy in their personal and family lives, and states must offer more than ideological grounds for restraining individuals' exercise of private and family integrity.

Research into international human rights jurisprudence and its reflection in Canadian law should be undertaken to establish what constitutes a denial of such integrity protected by section 7 of the Charter, and what may be a limitation of integrity permissible by virtue of section 1 of the Charter.

### Rights to Information and Education

The evolution of Canadian criminal law shows us to be little more than two decades beyond characterizing the delivery of information about contraception as a Crime Against Morality. More recent experience in the United States shows how widely ideologically driven administrations can compromise health professionals' freedom to speak to patients about abortion options. The field of reproductive choice demonstrates the importance of patients being informed through counselling that offers them education in choices, not simply counselling that conditions them to accept a counsellor's or government's ideological preference.

Article 19.2 of the Political Covenant provides that

[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print ...

Article 19.3 observes the special duties and responsibilities that attend this right and provides that it may be subject to certain restrictions, but these

shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Accordingly, any policy of not informing infertile patients about opportunities for recourse to new reproductive technologies must be "provided by law" (that is, enacted in legislation or specified in subordinate regulations). Further, such policies must be established for the protection of public health or morals. For instance, any decision to prevent or discourage surrogate motherhood, whether practised on an altruistic or commercial basis, would have to be enacted and justifiable on such grounds. Similarly, although access to *in vitro* fertilization may be limited through decisions to withhold provincial funding, any decision to restrict means of private resort, for instance to private *in vitro* fertilization clinics, must be legislated and justified.

The right to information is developed in a more explicit form in the Women's Convention. Article 10 (h) provides that women shall enjoy equally with men

[a]ccess to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Several other provisions of the Women's Convention reinforce women's rights to information about family planning. The expression "family planning" is commonly understood to be a euphemism for planning to avoid pregnancy, although increasingly it is being applied in the context of birth spacing to maximize the health of women and their existing and prospective children. The expression is evolving, however, to include the prevention of avoidable infertility and the protection or restoration of reproductive health. It therefore includes appropriate sex and reproductive health education to prevent the spread of disease and to promote the preservation of reproductive capacity. Research can address whether "family planning" may include a positive component of planning a family with the assistance of a new reproductive technology.

#### Right to Reproductive Health and Health Care

By its adherence to Article 12.1 of the Economic Covenant, Canada recognizes "[t]he right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Canada also subscribes to the Constitution of the World Health Organization, which defines health as "a

state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

The inability to restrict fertility, as well as the fear of initiating or having to continue an unintended pregnancy, clearly endanger health. The World Health Organization is concerned with the development of reproductive health programs in member states to prevent unintended pregnancy, abortion, and infertility and, where possible, to develop effective treatment programs. Infertility is not in itself threatening to life or physical health, but it is evident that the inability to have wanted children may threaten mental health and denies the well-being mentioned in the World Health Organization definition of health.

Research may establish the breadth of Canadian courts' understanding of health; provincial health plans do not include dental care and commonly exclude support of assisted reproduction. The Royal Commission may want to address whether reproductive health dependent on assistance by artificial means should be included in provincial health plans, or whether the matter should be left to provincial judgment. Legal research on international human rights may establish the forms of reproductive health care that Canada has committed itself to recognize as a right of its citizens.

International agencies are increasingly placing the treatment, relief, and bypassing of infertility, including by reproductive technologies, in the wider context of reproductive health that is promoted and reinforced through such international human rights instruments as the Political and Economic Covenants and the Women's Convention. The World Health Organization Special Program of Research, Development and Research Training in Human Reproduction considers that reproductive health implies that people have the *ability* to reproduce, to regulate their fertility, and to practise and enjoy sexual relationships. It further implies that reproduction is carried to a *successful outcome* through infant and child survival, growth, and healthy development. It finally implies that women can go *safely* through pregnancy and childbirth, that fertility regulation can be achieved without health hazards, and that people are safe in having sex.<sup>8</sup>

This vision places the task of the Royal Commission in a somewhat broader context than that in which Commissioners may want to interpret their terms of reference. The underlying concept, however, has both broad and narrow aspects. One narrower aspect, for instance, concerns alternative gestation (that is, a surrogate mother) for a child whose own mother would present it with seriously impaired prospects for survival or healthy birth, for example because of chronic spontaneous abortion or phenyl-ketonuria (PKU).

Research may establish what degree of detail will be legally implied in the right to reproductive health care and children's rights to health inheritance.

A broader aspect under Canadian law, governed by the Charter's importation of international human rights principles, is whether Canadians

enjoy only equal rights to health services that provinces fund, or whether provinces are legally obliged to fund services to a level that the courts determine is required to achieve reproductive health.

### Right to the Benefits of Scientific Progress

The new reproductive technologies are clearly the product of scientific progress, but whether they represent benefits is a matter more open to interpretation. Like other scientific developments, the uses to which they may be put will govern whether they are beneficial or detrimental. Individual agendas will reflect differently on applications of reproductive technologies, some considering them beneficial, others considering them detrimental, and most making an assessment on the continuum linking benefit and detriment. The assessment of whether this area of scientific progress is beneficial cannot be made by reference to any legal criterion. It is for advocates of different causes to show that they are beneficial, or that they are not.

Article 15.1.b of the Economic Covenant recognizes the right of everyone "[t]o enjoy the benefits of scientific progress and its applications." Significantly, by the closely related Article 15.3, signatory states "undertake to respect the freedom indispensable for scientific research." This makes clear that the individual human right to the benefits of scientific progress includes freedom for scientific research. Research is regarded as the precondition to scientific progress, and the legal entitlement to the fruits of research includes a legal right to research itself. It does not follow that states have a duty to fund research, but they do have a duty to respect the freedom of those independently able to undertake research to do so. The Economic Covenant does not establish a state duty to support research, but a state duty to permit research and to respect the private freedom to pursue research. Accordingly, any legislation resulting from a recommendation to control scientific research will be subject to rigorous scrutiny under the Charter if it contains provisions that appear to restrict, for instance, the liberty of researchers or the liberty and security of others to enjoy the benefits of research achievements.

The reproductive technologies illustrate how research directed to one purpose can contribute to developments in another area. Studies to understand and overcome infertility have resulted in better understanding of planned prevention of fertility and of medical methods of abortion that are now called contragestion, which is a contraction of the term contragestation. Moreover, related research to inhibit conception furnishes knowledge through which infertility can be prevented or overcome and conception can be facilitated. Both pure and applied research may therefore contribute, sometimes in unexpected ways, to scientific progress, and human rights law protects the exercise of human imagination and understanding that can turn the potential of research to human benefit. The Economic Covenant is one of several international agreements on

scientific and technological exchanges that should be researched to determine their effect on reproductive technologies.

### **Right to Sexual Non-Discrimination**

Permeating international instruments, including the United Nations Charter, the Universal Declaration, and its implementing general and special conventions, is the principle of non-discrimination on grounds of sex, which is translated into domestic law through the Canadian Charter and the provincial human rights codes. Canadian jurisprudence confirms that pregnancy-based discrimination is sex discrimination because "[w]hile pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group." The Women's Convention is the predominant international instrument for the achievement of sexual equality. Its Article 1 defines "discrimination against women" as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Accordingly, discrimination consists in limitations, produced either on purpose or in effect, on women's exercise of rights, and women enjoy rights irrespective of their marital status.

The definition and the Convention supporting it transcend all other human rights including, for instance, the right to found a family. United Nations documentation has drawn on extensive worldwide evidence to reach the conclusion that "the ability to regulate the timing and number of births is one central means of freeing women to exercise the full range of human rights to which they are entitled." This observation was made in the context of birth control, but may apply no less to birth facilitation. Accordingly, the Royal Commission must exercise care in proposing distinctions between the sexes on such matters as procreative opportunities, gamete donation, and control of pre-embryos. Similarly, care must be exercised not to discriminate on grounds of age, for instance, concerning gamete donation or receipt.

This is not to say, of course, that distinctions on grounds of sex cannot be justified and legally sustained. Not every distinction constitutes discrimination, and discrimination itself may be considered permissible under section 1 of the Charter (although section 1 may compromise Canada's adherence to the international covenants and conventions it has ratified). The Human Rights Committee established under the Political Covenant applies a standard of reasonableness to assess national legislation where sex discrimination is concerned; the Committee has observed that a "differentiation based on reasonable and objective criteria does not amount to

prohibited discrimination within the meaning of article 26 [of the Political Covenant]."<sup>12</sup>

Research may be undertaken to review in a comprehensive way what forms of distinctions in recourse to new reproductive technologies and, for instance, in support of reproductive health research may constitute unlawful discrimination on grounds of sex. Alternatively, research might be postponed until the Royal Commission formulates tentative recommendations, which could then be reviewed to determine whether any appear to offend international human rights provisions on sexual non-discrimination. The latter approach would, of course, be more economical and might be an exercise of no less scholarly value.

### **Enforceability**

Once domestic remedies have been exhausted, Canadian law at the federal, provincial, and territorial levels can be challenged before several international tribunals on grounds of violating international human rights provisions. The International Court of Justice has jurisdiction under the conventions Canada has ratified in contentious cases brought by parties from other states and can give Advisory Opinions (which, strictly, are not legally enforceable but which carry political weight) on the request of, for instance, the United Nations General Assembly. In light of international experience, it is improbable that challenges to Canadian legislation would be presented at this level.

On the other hand, however, Canada has direct and embarrassing experience of national legislation being scrutinized and condemned as contrary to the Political Covenant before the Human Rights Committee. Because of the evolving interdependence of international covenants and conventions, the Human Rights Committee has observed that the anti-discrimination provisions of the Political Covenant "would still apply even if a particular subject-matter is referred to or covered in other international instruments" such as the Women's Convention. 14

Further, under the Women's Convention itself, Canada is obliged to submit periodic reports of its activities, including legislation concerning the status of women and sex-based discrimination. When the Committee on the Elimination of Discrimination Against Women receives and reviews country reports, private groups, including activist groups with special interests, may make public responses critical of the government's submission; such criticism may be politically influential when the Committee discusses the report. Similar reporting obligations arise under the Political and Economic Covenants, and the Economic Committee also accommodates private reports.

Since joining the Organization of American States, Canada is accountable for conformity of its laws to the American Declaration of the

Rights and Duties of Man and amenable to the jurisdiction and jurisprudence of the Inter-American Commission on Human Rights. <sup>15</sup> The Inter-American Commission has jurisdiction over cases arising under the American Declaration, including cases concerning reproductive rights and sexual discrimination, and has entertained challenges against U.S. legislation in these areas. <sup>16</sup>

Accordingly, research might be undertaken to establish before which general international tribunals and international human rights tribunals and committees Canada is answerable for its legislation affecting new reproductive technologies. Options would be to undertake a survey in the abstract, or to postpone a survey until the Royal Commission has considered the direction of its recommendations.

#### **Notes**

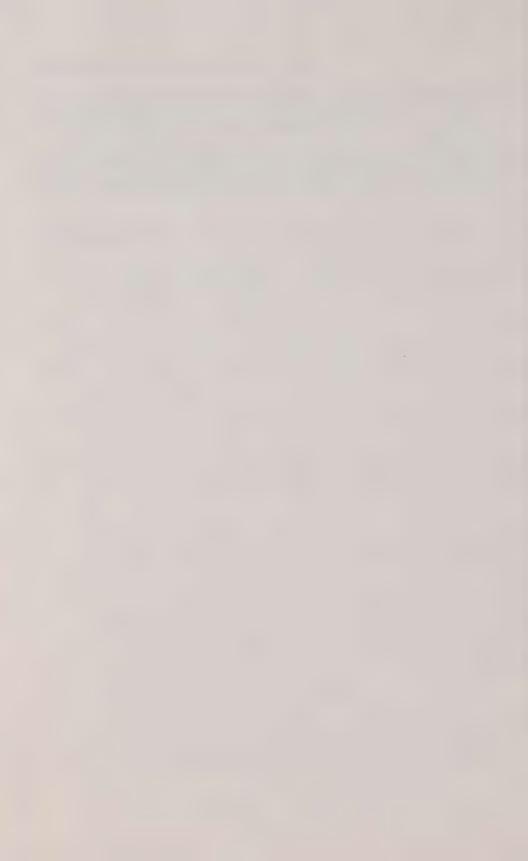
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- 2. Ibid., 268.
- 3. United Nations, International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), 16 December 1966); International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200 A (XXI), 16 December 1966); Convention on the Elimination of All Forms of Discrimination Against Women (General Assembly resolution 34/180, 18 December 1979).
- 4. United Nations, Human Rights Committee, "General Comment," CCPR/C/21/Rev.1, 5, para 5, 19 May 1989.
- 5. R.J. Cook, "U.S. Population Policy, Sex Discrimination, and Principles of Equality under International Law," *New York University Journal of International Law and Politics* 20 (1987), 114-30.
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- 13. See, for example, *Lovelace v. Canada*, 36 U.N. GAOR, Supp. (No. 40) 166; U.N. Doc. A/36/40 (1981).
- 14. Broeks v. the Netherlands, 42 U.N. GAOR, Supp. (No. 40) 149, at para 12.1; U.N. Doc A/42/40 (1987).
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#### **Mandate**

(approved by Her Excellency the Governor General on the 25th day of October, 1989)

The Committee of the Privy Council, on the recommendation of the Prime Minister, advise that a Commission do issue under Part I of the Inquiries Act and under the Great Seal of Canada appointing The Royal Commission on New Reproductive Technologies to inquire into and report on current and potential medical and scientific developments related to new reproductive technologies, considering in particular their social, ethical, health, research, legal and economic implications and the public interest, recommending what policies and safeguards should be applied, and examining in particular,

- (a) implications of new reproductive technologies for women's reproductive health and well-being;
- (b) the causes, treatment and prevention of male and female infertility;
- (c) reversals of sterilization procedures, artificial insemination, in vitro fertilization, embryo transfers, prenatal screening and diagnostic techniques, genetic manipulation and therapeutic interventions to correct genetic anomalies, sex selection techniques, embryo experimentation and fetal tissue transplants;
- social and legal arrangements, such as surrogate childbearing, judicial interventions during gestation and birth, and "ownership" of ova, sperm, embryos and fetal tissue;
- (e) the status and rights of people using or contributing to reproductive services, such as access to procedures, "rights" to parenthood, informed consent, status of gamete donors and confidentiality, and the impact of these services on all concerned parties, particularly the children; and
- (f) the economic ramifications of these technologies, such as the commercial marketing of ova, sperm and embryos, the application of patent law, and the funding of research and procedures including infertility treatment.

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